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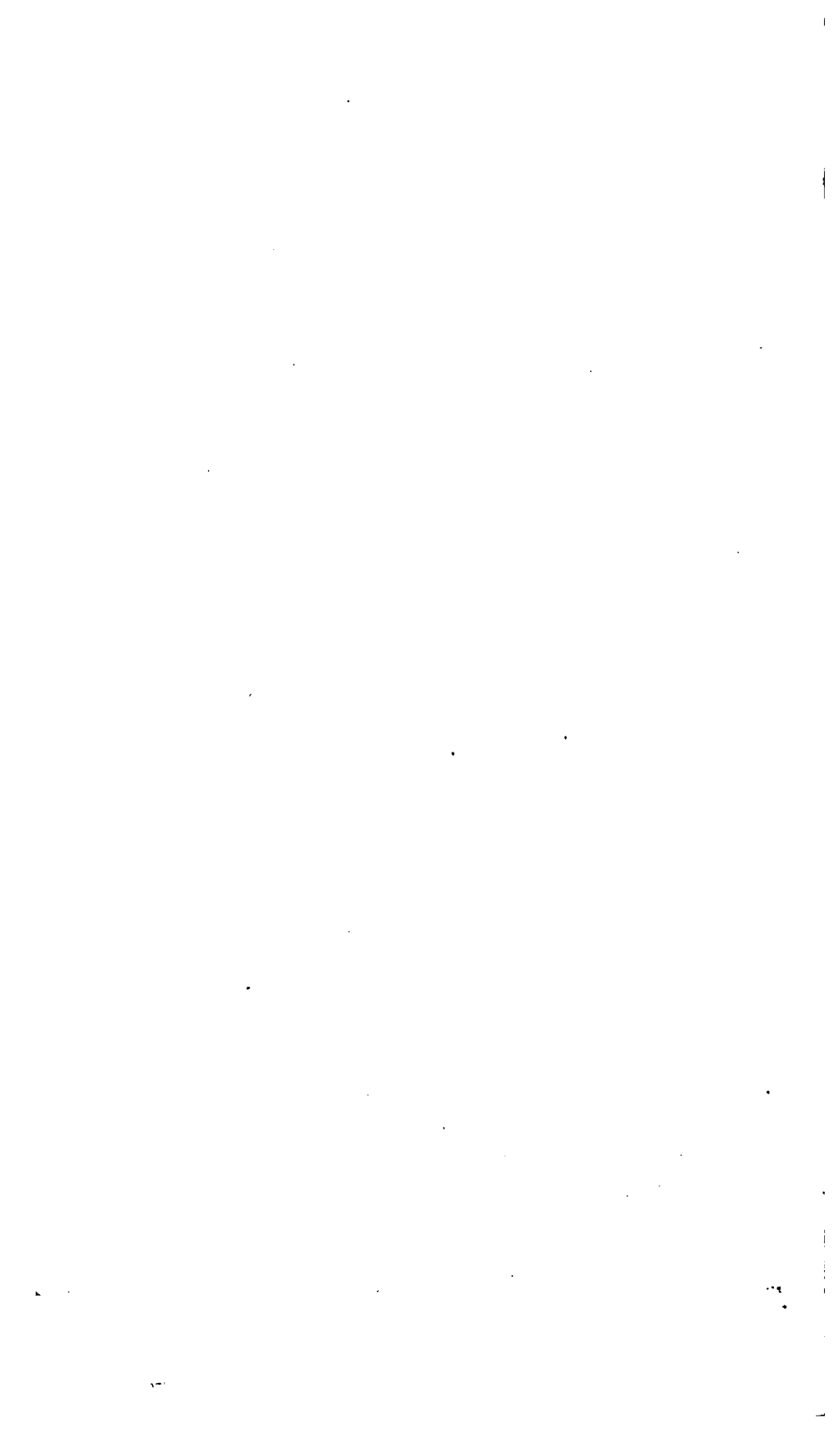










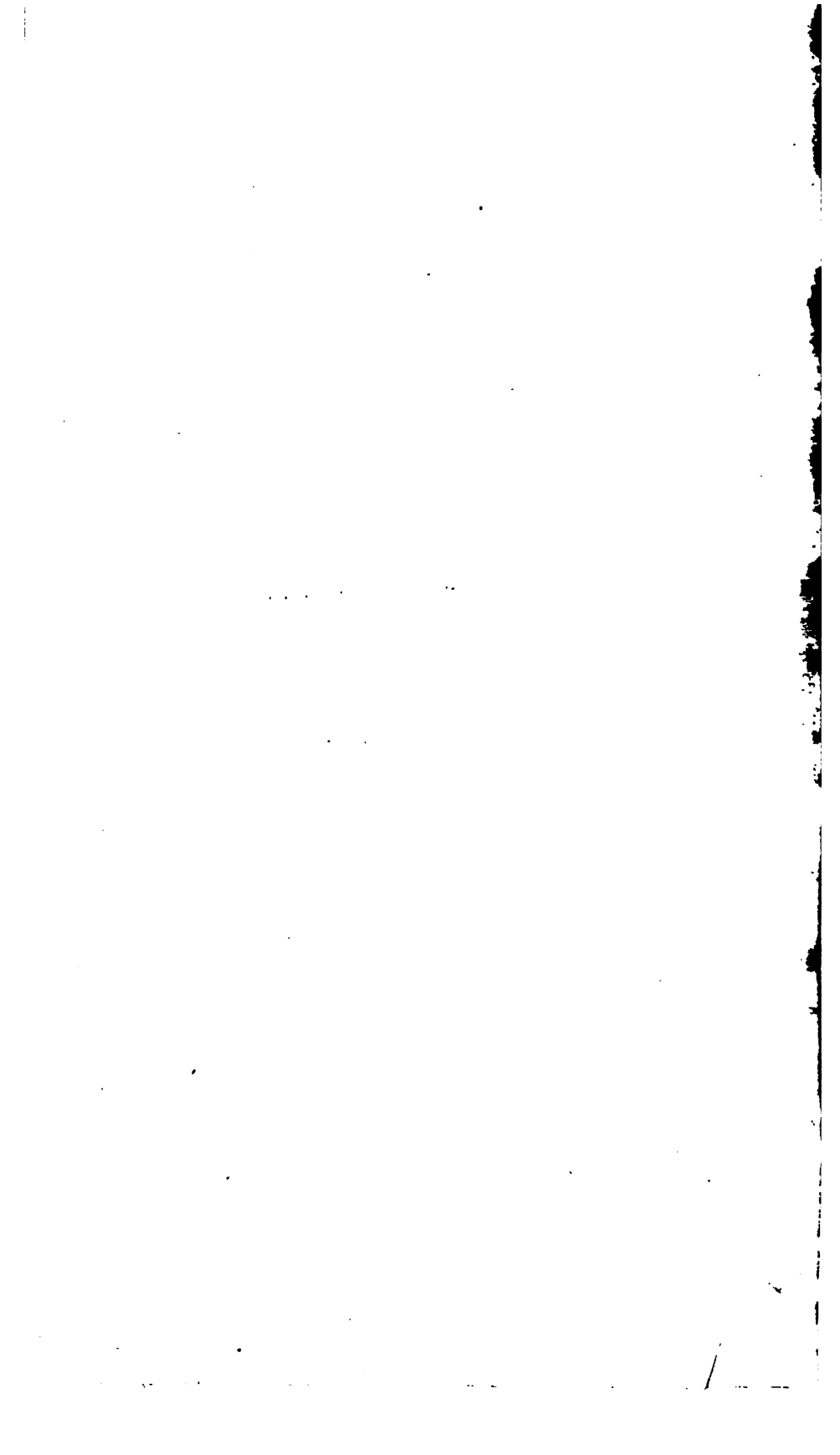


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1st June 1825

WINDFORD [PAID] WINDFORD



A

# SUMMARY

OF THE

## Law of Lien.

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By BASIL MONTAGU, Esq.

BARRISTER AT LAW.

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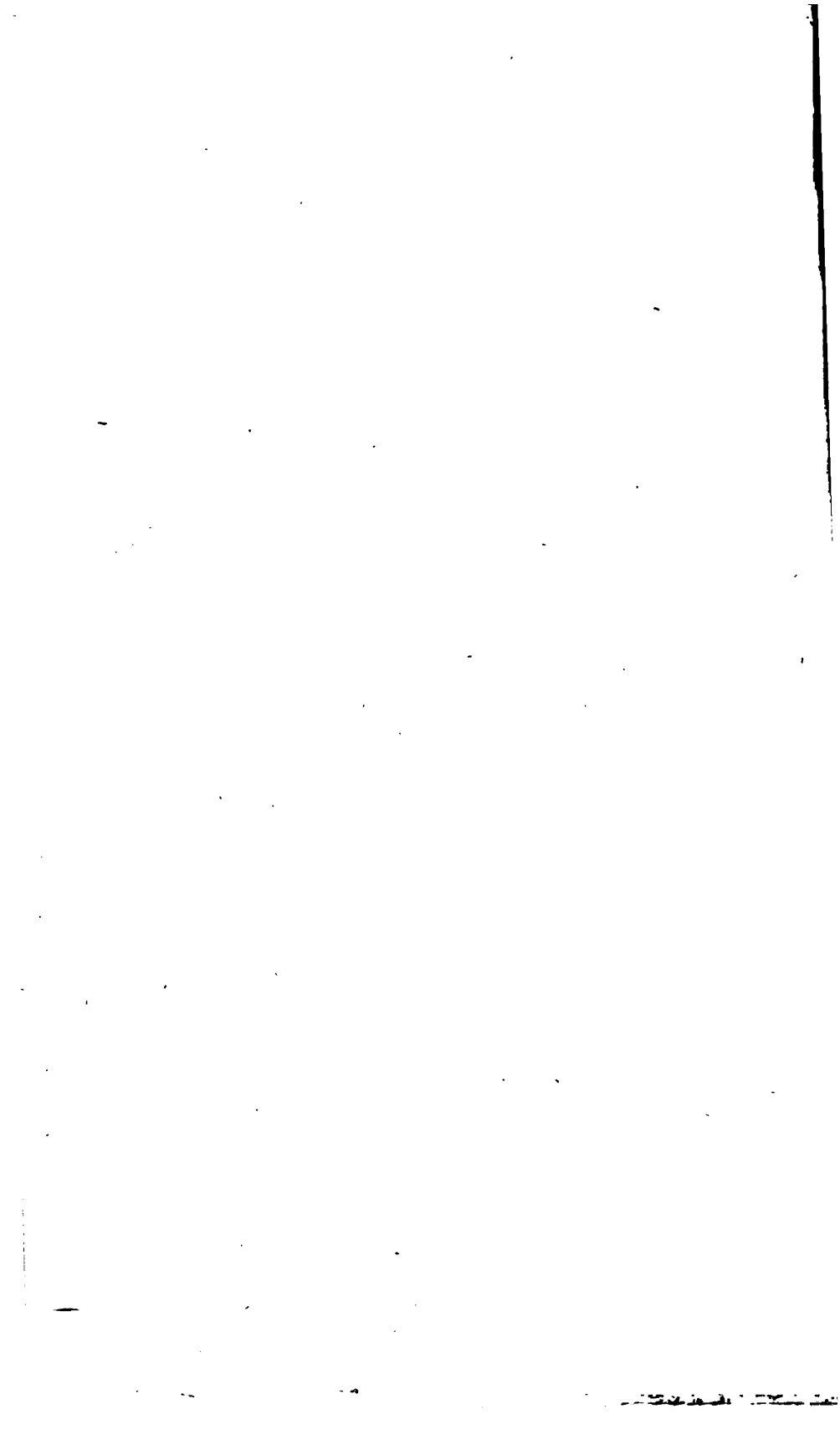
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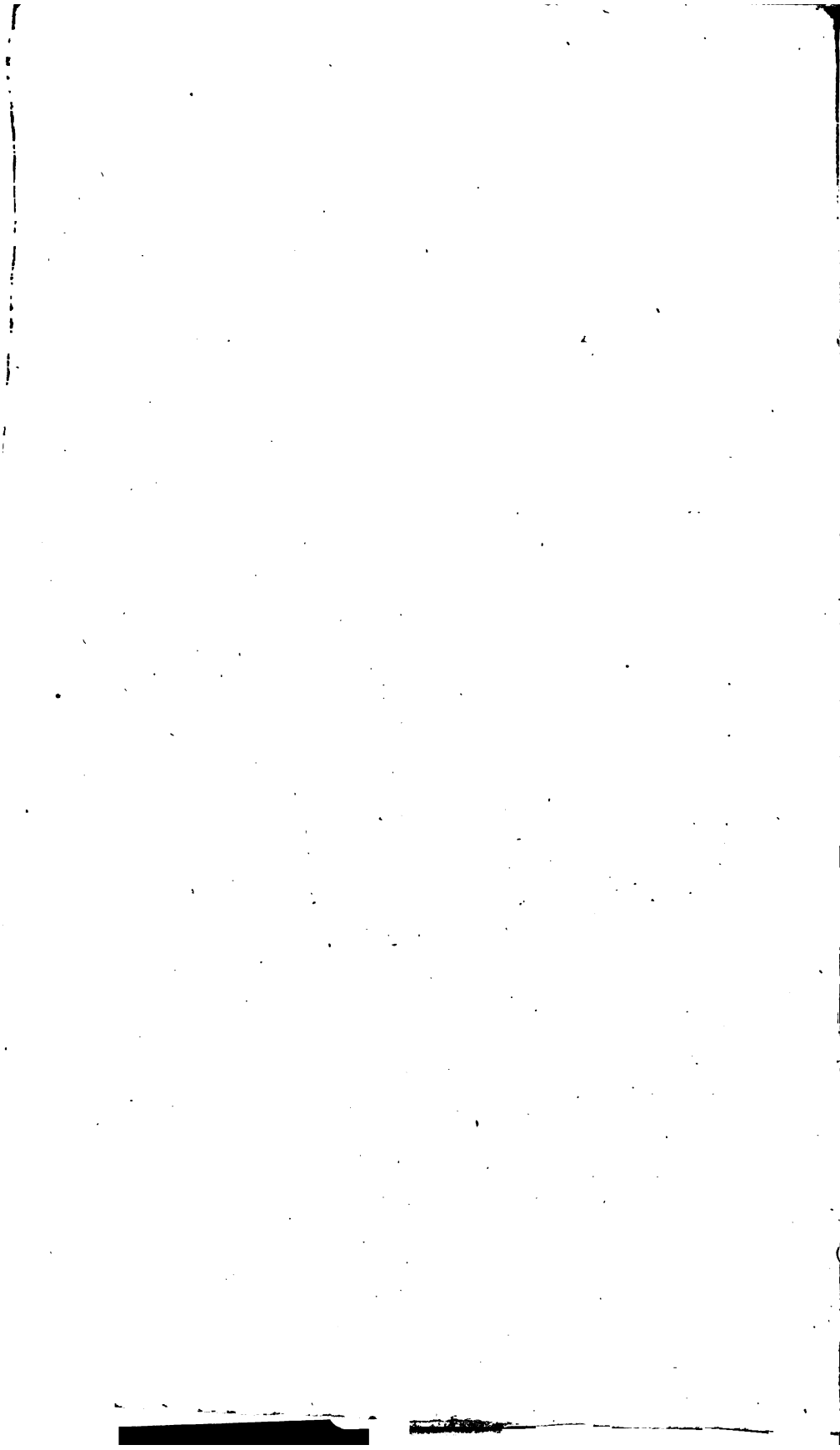




## ADVERTISEMENT.

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**H**AVING been engaged for some time in preparing for publication an outline of the law of equity, with a minute digest of pleading and evidence, and foreseeing that a few years must elapse before this work will be completed, I thought that I might, during its progress, annually publish a tract upon commercial law. Under the influence of this opinion this summary of the law of lien has been composed: but I find it has occupied so much time, that I must reluctantly abandon my intention, and confine myself to the work which I originally projected. This plan will, I please myself with thinking, be completed by my friend and pupil, Mr. Jameson.



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# Lien.

## Introductory Chapter.

**LIEN** is a right by the possessor of property to hold it for the satisfaction of some demand. (a)

Doubts have been entertained whether the courts do or do not favor liens. (b)

---

(a) The following are dicta, defining the meaning of the word *Lien* :—

D. Buller, *J. Lickbarrow v. Mason*, 6. East, 27, in Note, liens are qualified rights which, in given cases, may be exercised over the property of another.

In *Hammonds v. Barclay*, 2. East, 227, Grose, J., a lien is a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied.

*Wilson v. Balfour*, 2. Camp. 579, Lord Ellenborough, "A lien means a right to hold."

"The question with respect to lien always is, whether there be a right to detain the goods till a given demand shall be satisfied." *Gladston v. Birley*, 2. Merivale, 404.

*Ex parte Heywood*, 2. Rose, 357, D. Lord Ellenborough, "Lien, in its legal sense, means a right to possess, or to retain."

(b) The following are the dicta upon the subject :—

In *Ex parte Deeze*, A. D. 1748, 1. Atk. 228, Lord Chancellor—"Notwithstanding the rules of law as to bankrupts reduce all creditors to an equality, yet it is hard where a man has a debt due from the bankrupt, and has, at the same time, goods of the bankrupt in his hands, which cannot be got from him without the assistance of law or equity, that the assignees should take them from him without satisfying the whole debt."

*Kruger v. Wilcox*, A. D. 1755, Amb. 252, Lord Hardwicke says, "This is a case of bankruptcy, in which this court always inclines to equality; yet if any person has a specific lien, or a special property in goods, which is clear and plain, it shall be reserved to him, notwithstanding his bankruptcy."

In *Green v. Farmer*, A. D. 1768, 1. Black, 651, Lord Mansfield says, "Natural

## Lien is either at law or in equity.

equity is certainly much in favor of liens; so that courts of justice have always leaned that way, as far as was consistent with positive law."

In *Wilkins v. Carmichael*, A. D. 1779, Doug. 97, Lord Mansfield says, "Notwithstanding the strongest inclination that the defendant should have satisfaction before the value of the ship is paid over by him, we are not able," &c.

D. Ashurst, *J. Kinloch v. Craig*, 1789, 3. Ter. Rep. 119,—“Doctrine of liens ought to be governed by equitable principles.”

In *Kirkman v. Shawcross*, A. D. 1794, 6. T. R. 14, Lord Kenyon says, “In every case which has occurred, and in which the question of liens has arisen, it has been the universal wish of the courts, at all times, to extend the lien as far as possible.” See also the opinions of all the judges in this case.

Lawrence, J.—“It is laid down, in the case in *Burrow*, that liens are for the convenience of commerce, and that they are on the side of natural justice. And the question here is, whether an agreement, which is on the side of natural justice, be or be not illegal, it having been made by a number of persons.”

In *Houghton v. Matthews*, 1803, 3. Bosc. and Pull. 485. D. Lord Alvanley—“I am not desirous of favoring liens to so great an extent as has been done by the courts of late; for we know it has been determined, that the members of any trade may, by agreement among themselves, obtain the benefit of that sort of lien to which a factor is entitled by the general law. I am sorry the courts have gone so far.”

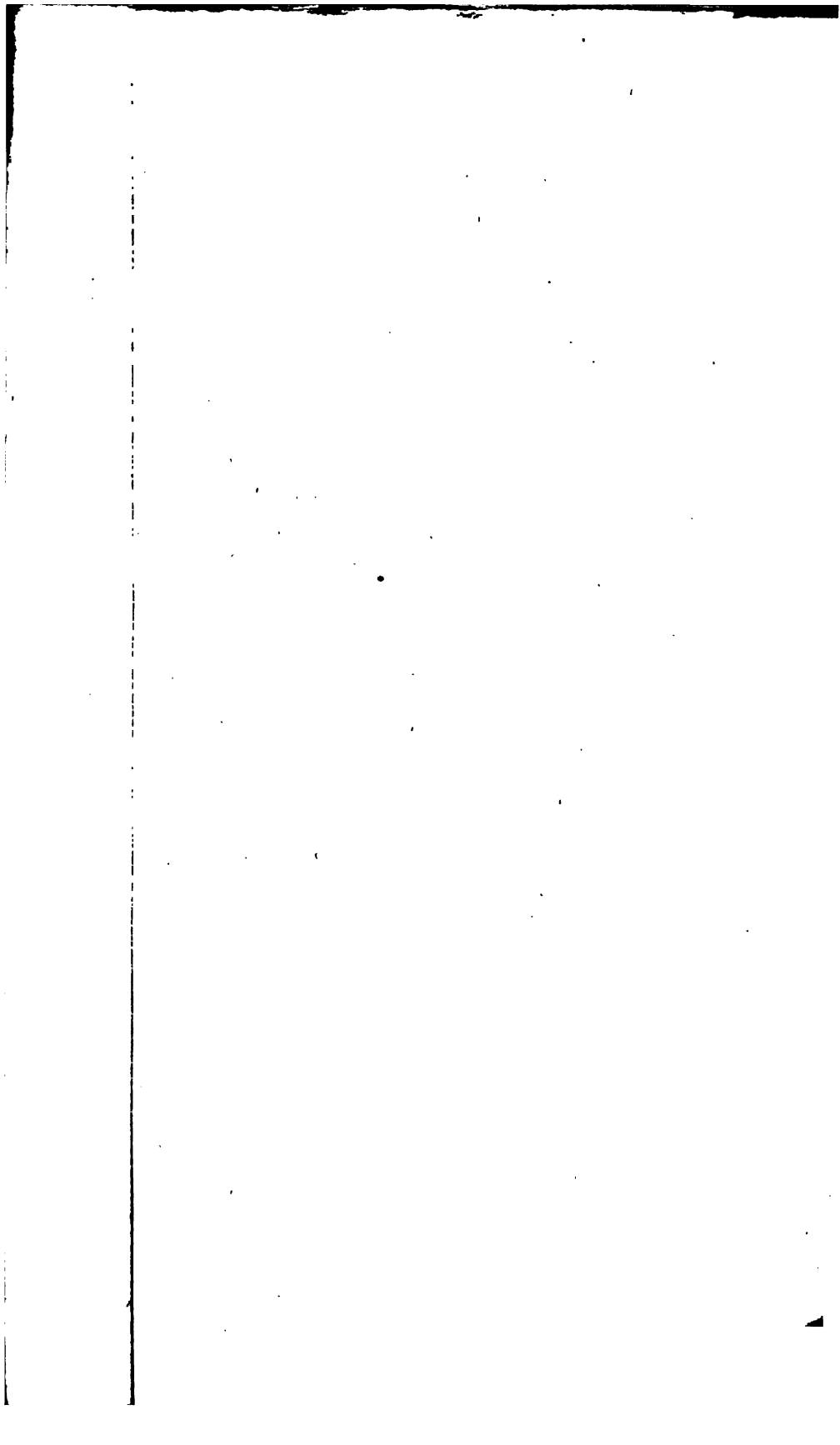
Le Blanc, J. General liens are a great inconvenience to the generality of traders, because they give a particular advantage to certain individuals who claim to themselves a special privilege against the body at large of the creditors, instead of coming in with them for an equal share of the insolvent's estate. All these general liens infringe upon the system of the bankrupt laws, the object of which is to distribute the debtor's estate proportionably amongst all the creditors, and they ought not to be encouraged.

*Rushforth v. Hadfield*, 7. East, 228. Lord Ellenborough. But at least it must be admitted, that the claim now set up by the carriers is against the law of the land, and the proof of it is therefore to be regarded with jealousy.

Lawrence, J. It is not fit to encourage persons to set up liens contrary to law. The carrier's convenience does not require any extension of the law; for they have already a lien for the carriage price of the particular goods, and if they choose voluntarily to part with that, without such a stipulation as I have mentioned, there is no reason for giving them a more extensive lien in the place of that which they were entitled to. I should not be sorry, therefore, if it were found generally that they have no such lien as that now claimed upon the ground of general usage.

Le Blanc, J. This is a case where a jury might well be jealous of a general lien, attempted to be set up against the policy of the common law, which has given to carriers only a lien for the carriage price of the particular goods. The party, therefore, who sets up such a claim, ought to make out a very strong case.

Q. 1. *Will not the courts be disposed to favor the lien as against the debtor, from the justice that a debtor should secure his creditor, and because the law is disposed to favor every person who is vigilant in the protection of his rights?*—Q. 2. *Will not the courts, in doubt-*



- session. (4.) { 1. Whether claimant ever had possession. (5.)  
 2. Whether he has parted with possession. (7.)  
 3. Regaining possession. (17.)

some unsatisfied demand. (19.)

ower. (21).

eneral custom. (23.)

pecial custom. (28.)

36.)

37.)

ship. (44.)

ship's papers. (48.)

cargo. (48.)

## LI.

ral. (61.)

t the assignees of bankrupts. (69.)

; the crown. (96.)



## Book I.

# Lien at Law.

## Introductory Chapter.

THE questions upon the lien at law may be thus exhibited.

- 1. General considerations.
  - 1. The claimant must be in possession.
  - 2. The claimant must have some unsatisfied demand.
  - 3. The extent of the possessor's power.
- 1. In general.
  - 2. Different sorts of lien.
    - 1. By custom . . . { 1. General.
    - 2. By agreement. (c) { 2. Special.
  - 3. Waiver of lien.
- 2. In particular.
  - 1. Upon ships.
  - 2. Upon public documents.
  - 3. By attornies.
  - 4. Against third persons.
  - &c. &c.

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*ful cases, be inclined against the lien of an individual creditor in a question between him and a general body of creditors upon the principle that equality is equity?*

(c) In *Wilson v. Heather*, 4. Taunt. 642, Gibbs, C. J. makes a distinction between a lien and a pledge; that is, between a lien by operation of law, and a lien by agreement; he says, "The right of lien does not arise out of any contract whatsoever but out of a right to hold property till the party claiming the lien has been paid for

## Part I.

### General Considerations respecting Lien.

#### CHAPTER I.

##### THE CLAIMANT MUST BE IN POSSESSION. (d)

THE various questions respecting possession may be thus exhibited.

- 1. Whether the claimant ever had possession.
- 2. Whether he has parted with possession.
  - 1. Parting with *all* the property.
  - 2. Parting with only *some* of the property.
  - 3. Parting with *actual*, but not with *constructive* possession.
    - 1. From necessity.
    - 2. From mistake.
  - 4. Parting with *constructive*, but not with *actual* possession.
- 3. Regaining possession.

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the operation he performs. I think it has been held, that if a person agrees to do the work for a specific sum, he loses his lien. This is a deposit for a sum lent on the ship: that is not strictly a lien." And Heath, J. says, "The calling it a lien will not make it such. This is no lien; it is a pledge."

It is usual to speak of lien by contract, though that is more in the nature of an agreement for a pledge. Lien, in its proper sense, is a right which the law gives. But it is usual to speak of lien by contracts, though that is more in the nature of an agreement for a pledge. Taken either way, however, the question always is, whether there be a right to detain the goods till a given demand shall be satisfied. That right must be derived from law or contract.—*D. Master of the Rolls in Gladstone v. Birley*, 2. *Merivale*, 404.

In *Smith v. Plummer*, 1. *Barn. and Ald.* 582. Bayley, J. says, "Liens only exist three ways; either by express contract, by usage of trade, or where there is some legal relation between the parties."

(d) *D. Buller, J. in Lickbarrow v. Mason*, 6. *East*, 27. — Liens at law exist

WHETHER THE CLAIMANT EVER HAD POSSESSION.

If a principal consign a cargo to his factor who is in possession, both of the invoice stated in a letter to be consigned to him for sale on account of his principal, and of the bill of lading, unindorsed, but expressed to be shipped by the principal to be delivered to him or his assigns, he or they paying freight; if the factor insure the cargo; and, upon the arrival of the ship, he order the captain to lie out in the stream, and not come to the wharf, as he cannot unload the ship, as there is then an additional duty to be paid on the cargo; and if, upon the captain's wanting money, the factor pay him a small sum, on account of freight; the factor has not such a possession of the cargo as to entitle him to a lien. (e)

The right to receive the proceeds of a cargo does not create a lien, unless the claimant gain possession of the cargo. (f)

If a trader write to his factor, saying that he shall consign goods to him; upon the credit of which the factor accept bills drawn by the trader; and the trader ship the goods in his own name, without any direction to whom

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only in cases where the party entitled to them has the possession of the goods; and if he once part with the possession after the lien attaches, the lien is gone. In *Heywood v. Waring*, 4. Camp. 291, Lord Ellenborough says, "Humble and Holland may be entitled to the 3000*l.* in question; but I do not see how they can have a lien on the proceeds of this cargo to that or any other amount. They never were in possession either of the cargo or of the proceeds: and without possession there can be no lien. A lien is a right to hold: and how can that be held which was never possessed?"

In *Hallet v. Bousfield*, 1811, 18. Ves. 188, Lord Eldon says, "How can the doctrine of lien, the right of a party *having property in his possession*, to retain it until his demand is satisfied, be applied to the interest of a freighter, who has no possession, the whole being in possession of the owner?"

(e) *Kinloch v. Craig*, 3. Term Rep. 119. (App. 21.) See *Sweet v. Pym*, 1. East, 4; (App. 37); and *M'Combie v. Davies*, 7. East, 5. (App. 160.)

(f) *Harvey v. Liddiard*, 1. Starkie, 123.

they are to be delivered, the factor has no lien upon such goods unless they come into his actual possession. (g)

It has been ruled, that if a debtor deliver to a creditor an order to receive some money in the hands of a carrier on the road, the creditor has not a lien upon the money before the order is delivered to the carrier. (h)

If a firm abroad send goods to a correspondent, with directions to him to apply part of the proceeds to another firm in England, of which one of the partners abroad is a partner, the London firm has not a lien on such proceeds whilst they are in the possession of the correspondent. (i)

A deposit of title-deeds by a debtor with his own wife to hold for a creditor is not a sufficient possession by the creditor to give a lien. (k)

It has been doubted whether such a deposit with a third person is a sufficient possession to create a lien. (k)

If a banker misapply securities with which he is entrusted, and, to secure his customer, the banker inclose bonds of his own in an envelope, upon which he writes that they are deposited as a collateral security to the customer, whose property they are, and he then deposit them in an iron chest among the securities belonging to other customers, the customer whose securities have been so misapplied has not a lien upon the bonds. (l)

If a trader agree to purchase a house at a fixed sum, and the furniture at a valuation, which is made, and the assignment is executed, but no possession is delivered; and the purchaser decline to complete the contract; and

(g) *Nichols v. Clent*, 3. Price, 547.

(h) *Harvey v. Liddiard*, 1. Starkie, 123.

(i) *Ex parte Heywood*, 2. Rose, 355.

(k) *Ex parte Coming*, 9. Ves. 115.

(l) *Wilson v. Balfour*, 2. Camp. 579.

the vendor obtain judgment upon the agreement to assign the house and furniture, and there are accounts for chattels bargained and sold, but none for goods sold and delivered, the vendor has a lien upon the house and furniture. (m)

It has been ruled, that if the factor of a ship-owner request the master to deliver to him the certificate of the ship's register, that he may pay the duties at the custom house, and it is delivered accordingly, the factor has not a lien upon it for a general balance due from the ship-owner, nor, as it seems, for the amount of the duties which he pays. (n)

If a person pay the freight that he may obtain a wrongful possession of the goods, he has not a lien upon the goods for the amount of the freight which he has paid. (o)

If to obtain possession of goods upon which a creditor has a lien it is necessary for him to pay the freight, he has, as it seems, a lien for the amount so paid. (o)

#### **PARTING WITH THE WHOLE.**

If a creditor part absolutely with the possession of a ship, upon which he has a lien, he loses his lien. (p)

If the master of a ship part with the possession of the cargo, he loses his lien for freight. (q)

If the owner of a vessel deliver up possession to a charterer, the owner has not such a possession as to give him a lien for freight. (r)

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(m) *Ex parte Seaforth*, 1. Rose, 306. 19. Ves. 235.

(n) *Burn v. Browne*, 2. Starkie, 272.

(o) *Lempriere v. Pasley*, 2. Term Rep. 487.

(p) *Ex parte Shank*, A. D. 1751, 1. Atk. 234. (App. 12.)

(q) *Abbot*, 246.

(r) *Hutton v. Bragg*, 7. Taunt. 14. (App. 171.)

The master of a ship does not lose his lien upon goods by sending them to a wharf, and ordering the wharfinger not to part with them till the freight and other charges are paid. (s)

If a factor, who has a balance due from his principal, pay the customs and charges of a cargo consigned to him, and he afterwards part with the cargo to the principal, he loses his lien. (t)

If the factor suffer his principal to employ a broker, and the factor tell the broker that the principal intends himself to sell the goods to save commission: and the factor give orders to his warehouseman to deliver the goods to the broker; to whom they are so accordingly delivered, this is a sufficient parting with possession by the factor to divest him of his lien. (t)

#### PARTING WITH PART OF THE PROPERTY.

If the consignee of a cargo of barrels of tar receive the bills of lading made unto order, "he or they paying freight for the said goods;" and the consignee assign the cargo before its arrival for a valuable consideration; and upon the arrival of the ship, the consignee enter and report it; and the captain deliver to the assignee of the consignee some of the barrels of the tar; and such assignee have not sold the tar to different persons,—the captain has a lien upon the remainder of the tar for the freight both of the remainder, and of the quantity delivered. (u)

A tailor who is employed to make a suit of clothes has a lien for the whole price upon any part of them. (x)

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(s) Abbot, 246.

(t) Kruger v. Wilcox, A. D. 1755, Amb. 252. (App. 14.)

(u) Sodergreen v. Flight, 1776, cit. arg. in Hanson v. Meyer, 6. East, 622.

(x) D. Lord Ellenborough, Blake v. Nicholson, 3. M. and S. 167.

**PARTING FROM NECESSITY.**

An innkeeper does not lose his lien upon the horse of his guest, by putting him out to pasture. (y)

If the commodity upon which the creditor has a lien be of a perishable nature, he may safely part with it, upon a proper agreement that the lien shall await the event of an application to the court. (z)

If the consignee of tobacco on board a vessel make an entry at the Custom-house, as is usually done, and as is by law required to be done, before tobacco can be landed; and the tobacco is afterwards landed, and duly taken by the proper officers of the Customs to the King's warehouse, as is the usual mode of landing tobacco, it seems to have been doubted whether the captain loses his lien for freight. (a)

If goods are removed out of a ship into the West-India docks, in obedience to the law, the captain does not part with his lien. (b)

If a factor part with the actual possession of the goods of his principal to a purchaser, against whom he may maintain an action for the value of the purchase money, or to whom, upon payment, he may give a discharge: the vendee will be authorized in paying the purchase money to the factor, after notice from the principal not to pay it, and he will have a lien upon it against the principal. (c)

It has been said that a factor has a lien upon the price to be paid by the purchaser of goods. (d)

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(y) 2. Roll. Abr. 85.

(z) *Ex parte Ockenden*, 1. Atk. 235. (App. 11.) See *Copland v. Stein*, 3. Ter. Rep. 199.

(a) *Ward v. Felton*, 1801, 1. East, 508.

(b) *Wilson v. M<sup>c</sup>Taggart*, 1. M. and Selw. 147. (App. 146.)

(c) *Drinkwater v. Goodwin*, Cowp. 251. (App. 18.)

(d) In *Houghton v. Matthews*, 3. Bos. and Pull. 485 (App. 72), *Chambre, J. says*,

If a person agree to buy some plate from a silversmith, and the silversmith send for his engraver to engrave upon the plate the arms of the vendee, and both vendor and vendee direct the engraver to bring back the plate to the vendor, who is to pay for the engraving; and the vendee pay the vendor, in notes of a country bank, which fails on the next day before they are presented for payment; the vendor is entitled to his lien on the goods, upon their being returned to him by the engraver. (e)

If the owner of a horse tortiously take him from an innkeeper, who has a lien upon the horse, the innkeeper may make fresh pursuit after him; but if he does not make fresh pursuit, he cannot retake it. (f)

#### PARTING FROM MISTAKE.

If a creditor part with the possession of choses in action, upon which he has a lien, such parting being in consideration of an assignment executed after the bankruptcy of the debtor in pursuance of an agreement made before the bankruptcy, and this assignment be void, it seems that he has a lien upon the choses in action with which he has parted. (g)

If a creditor have an equitable lien upon an estate of the bankrupt's by possession of the title-deeds; and upon the estate being put up to auction, it is bought by one of the assignees under the commission, to whom the creditor delivers the title-deeds, and this purchase is afterwards set aside, the creditor is entitled to his lien. (h)

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"Where a factor is in advance for goods by actual payment, or where he sells under a *del credere* commission, whereby he becomes responsible for the price, there is as little doubt that he has a lien on the price, though he has parted with the possession of the goods."

(e) *Owenson v. Morse*, 7. Ter. Rep. 64.

(f) *Rosse v. Branstead*, 2. Roll, 438.

(g) *Vernon v. Hankey*, 2. Ter. Rep. 113.

(h) *Ex parte Morgan*, 1806, 12. Ves. 6.



If a person who has a lien upon a lease, deliver the lease to be sold under an execution which is invalidated by a prior act of bankruptcy, he does not lose his lien. (i)

If the freighter of a ship give to the captain a navy bill as a security till a bill of exchange drawn upon the assignee of the navy bill is accepted; and the captain, after indorsing the bill of exchange, send it to a third person, with a letter from the freighter to the drawee of the bill of exchange, in which letter the navy bill is inclosed, and which letter desires such drawee to tender the navy bill at the navy office, and advises the drawee of the bill of exchange; and the third person send the letter inclosing the navy bill, and also the bills of exchange, to the drawee, the captain does not lose his lien on the navy bill, if the bill is not accepted. (k)

#### PARTING WITH CONSTRUCTIVE BUT NOT WITH ACTUAL POSSESSION.

##### *Lien of Vendors.*

If a vendor of goods have *unconditionally* delivered the whole of the goods sold, he is divested of his lien upon the whole, or any part remaining in the actual possession of the vendor (l); but if the delivery were *conditional*, and the condition be not performed, he has a lien upon such part as is in his actual possession. (m)

(i) Ex parte Doughty, Aug. 14, 1806.

(k) Pierson v. Dunlop, Cowp. 571.

(l) Similar questions which arise after the property has been removed from the place where it was deposited at the time of the sale, seem to be more properly considered under property in transitu.—Owenson v. Morse, 7. Ter. Rep. 64. is a case which seems to be, as it were, on the boundary between the cases on lien and the cases of stopping in transitu.

(m) Knight v. Hooper, T. 8. W. III. Skin. 647. Anon. M. 11. W. III. 12. Mod. 354. (both cited by Holroyd in arg. in Hanson v. Meyer, 6. East, 618.) D. Lord Kenyon, Ellis v. Hunt, A. D. 1782, 3. Ter. Rep. 464. Stubey v. Hayward, H. 1795, 2. H. Bl. 504. Copland v. Stein, 1799, 8. Ter. Rep. 199. Hammond v. Anderson, Jan. 1804, 4. Bos. and Pull. 89. Hanson v. Meyer, Jan. 1805, 6. East, 616. Ex parte Gwyne, April 19, 1806, Lincoln's Inn Hall, MSS.

The questions upon this subject are then of two classes.

- |   |                                    |   |   |                       |
|---|------------------------------------|---|---|-----------------------|
| { | 1. Was the delivery of the whole.  |   |   |                       |
|   | 2. Was it absolute or conditional. | <table border="0"> <tr> <td rowspan="2" style="vertical-align: middle; font-size: 4em;">{</td> <td style="vertical-align: top;">1. Absolute delivery.</td> </tr> <tr> <td style="vertical-align: top;">2. Conditional delivery.</td> </tr> </table> | { | 1. Absolute delivery. |
| { | 1. Absolute delivery.              |   |   |                       |
|   | 2. Conditional delivery.           |   |   |                       |

**WHETHER THE WHOLE IS DELIVERED.**

It seems that the delivery to divest the vendor of his lien, may be symbolical by a delivery of the key of his warehouse. (*n*)

If a vendor sell a considerable number of bales of bacon, and after weighing the goods, he leave an order with the wharfinger at whose wharf the goods lie, to deliver them to the vendee or his order, who within six days after the sale, weighs the whole of the bacon, takes away twenty-five bales, and leaves the remainder at the wharf; and by the custom of the trade, where goods continue to lie at the wharf after the sale, the charges of warehousing are always borne by the vendor for fourteen days from the sale, at the expiration of which time, and not before, they are entered in the books of the wharfinger in the name of the vendee, the vendor has not a lien upon the remainder. (*o*)

It seems that when possession is taken by the vendee of part of the goods sold by an entire contract, possession is taken of the whole. (*p*)

**ABSOLUTE DELIVERIES.**

If a trader sell a quantity of timber lying at his wharf, and the timber is marked, in the presence of the vendor,

(*n*) D. Lord Kenyon, *C. J. Ellis v. Hunt*, 3. Ter. Rep. 464. *Copland v. Stein*, 8. Ter. Rep. 199.

(*o*) *Hammond v. Anderson*, 1804, 4. Bos. and Pull. 71.

(*p*) *Slubey v. Hayward*, 2. H. Bl. 504. D. Mansfield, C. J. *Hammond v. Ander-*

by the vendee, and with his mark ; and the vendor says he will send the timber to a sea-port ; and the vendee give bills, at the usual credit, for the purchase-money ; and a small quantity of the timber is forwarded by the vendor to a wharf, to be sent to London, and another small quantity to the sea-port originally specified, and the purchaser sell to, and is paid by, a sub-vendee, who gives notice of his purchase to the original vendor, who says, " It is very well, and that he will go with him, and show him the timber," and he go accordingly and compare the account delivered by the first purchaser with his (the original vendor's) account, and the marks of the sub-vendee are then put upon all the timber, and upon some of it in the presence of the original vendor, to whom notice is given not to send any more to the first purchaser, the original vendor has not a lien against the sub-vendee. (g)

If sixty-eight bags of wool are sold, and by the invoice they are to be weighed off immediately, and are to be paid for by a bill at nine months' date, but no such bill is ever drawn by the vendor, and if the wools, which are of different qualities and values, are weighed and remain in the warehouse of the vendors, but samples are sent to the purchaser to enable him to go into the market, and upon sales by the purchaser from time to time to different persons of parts of the wool, orders are given to such vendees to enable them to receive the wool from the original vendors, by whom such parcels are accordingly delivered ; the original vendor has not a lien against a ven-

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son. 4. Bos. and Pull. 71. See the observations of Le Blanc, J. during the argument of *Holroyd v. Hanson* in *Hanson v. Meyer*, 6. East, 625.

(g) *Stoveld v. Hughes*, 1811, 14. East, 308.

dee from the purchaser to whom payment has been made, for the original purchase-money which is unpaid. (r)

If a trader purchase ten tons of oil, part of forty tons lying in a cistern, of which the proprietor of the remaining thirty tons has the key; and if, at the time of the purchase, the vendee receive from the vendor an order on the proprietor of the thirty tons to deliver to the purchaser the said ten tons of oil; and the order is taken to the proprietor of the thirty tons, who writes upon it "Accepted," and signs it; if the purchaser never demand the oil from the proprietor of the thirty tons, and the oil is not subject to any rent, as the original importer paid the rent for twelve months, and sold it rent-free for a time which has not expired, the vendor has not a lien. (s)

#### CONDITIONAL DELIVERIES.

If a vendor sell all his starch, lying at the warehouse of a warehouse-keeper, at 6*l.* per cwt. to be paid by a bill at two months, and the starch is in papers, and the weight to be afterwards ascertained, and the vendor, according to the course of the trade, give an order to the vendee, to be delivered to the warehouseman, to weigh and deliver all his (the vendor's) starch, which order is lodged by the vendee at the warehouse; and the vendee, at the time of the lodgment, require the warehouseman to weigh and deliver part of the starch, which, being so weighed and delivered, is removed by the vendee, who does not give the bill at two months, or apply for the weighing and delivering the residue, the vendor has a lien upon such residue. (t)

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(r) *Green v. Haythorne*, 1. Starkie, 447.

(s) *Whitehouse v. Frost*, 12. East, 616.

(t) *Hanson v. Meyer*, 1805, 6. East, 627. (App. 96.) See *Rugg v. Minett*, 11. East, 210.

If a vendor sell felled timber by auction, and one of the conditions of sale is, that the purchaser shall, at the time of the purchase, give security for his lot, and no security be given by a vendee to whom a lot is sold, but he takes away part of the timber, it seems that the vendor has a lien upon the remainder. (u)

If a person agree to sell some standing trees to be cut down and taken away by the vendee within a limited time, and to be paid for by instalments on fixed days, and the vendee cut and take away part but not the whole of the trees within the limited time, the vendor has a lien upon the remainder. (x)

*Payment according to the mode stipulated at the time of the sale is a condition precedent.* (y)

If a bill be given in payment which is dishonored, and the party taking the bill did not agree to run the risk of its being paid; it is not such a payment, according to the mode stipulated at the time of the sale, as to divest a vendor of his lien. (z)

If a person agree to buy some plate of a silversmith, and the silversmith send for his engraver to engrave upon the plate the arms of the vendee, and both vendor and vendee direct the engraver to bring back the plate to the vendor, who is to pay for the engraving; and the vendee pay the vendor in notes of a country bank, which fails on the next day before they are presented for payment; the vendor is entitled to his lien on the goods upon their being returned to him by the engraver. (a)

(u) *Ex parte Gwynne*, April 19, 1806. 12. Ves. 379. (App. 116.)

(x) *Ex parte Herbert*, Aug. 14, 1806.

(y) *Hammond v. Anderson*, 4. Bos. and Pull. 69. *Hanson v. Meyer*, 6. East, 626. See *ex parte Coming*, 9. Ves. J. 115. Q. If there be any doubts upon this subject from the judgment of Lord Ellenborough in *Hanson v. Meyer*.

(z) *Pickford v. Maxwell*, 6. Term Rep. 52. *Owenson v. Morse*, 7. Term Rep. 66.

(a) *Owenson v. Morse*, 7. Term Rep. 64. ante p. 10.

If the stipulated mode of payment be by a bill of exchange payable at a future day, and such bill has been given by the vendee to the vendor, there is a sufficient compliance with the condition to divest the vendor of his lien. (b)

*If any thing remain to be done on the part of the vendor before the commodity purchased is to be delivered, it seems that a complete right of property does not vest in the vendee.* (c)

If a vendee purchase from a broker oil lying at a wharf, and receive a sale-note from the broker to the following effect:—"sold for the vendors to the vendees fifty tons of oil at 44*l.* a ton in casks to be received at the wharf, and paid for by the buyer's acceptance at four months from the expiration of fourteen days, allowing for foot-dirt and water as customary," and if, on the thirteenth day after the date of such sale-note the purchaser apply to the vendor for an order of delivery of the oil, which is given as follows:—"please to deliver to A. B. the purchaser's fifty tons of our oil *ex* ninety tons;" if the order is sent to the wharfinger's wharf and received by their clerk at the counting-house on the same day; and if, before the oil is delivered, it is the custom to have the casks searched by a cooper employed by the seller, and it is also the custom for a broker, on behalf both of the buyer and seller, to attend to make a minute of the foot-dirt and water in each cask, and the casks are then filled up by the seller's cooper at the seller's expense, and delivered in a complete state containing the quantity sold, the vendor has a lien. (d)

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(b) *Hammond v. Anderson*, 4. Bos. and Pull. 69.

(c) *D. Lord Ellenborough, Hanson v. Meyer*, 6. East, 627.

(d) *Wallace v. Breeds*, 1811, 13. East, 524. *D. Lord Ellenborough*. The courts have frequently laid hold of circumstances like these to retain the property in favor of the unpaid seller.

## REGAINING POSSESSION.

If an innkeeper suffer the horse of his customer to be taken away, and the horse is, on some future occasion, brought to the inn, the innkeeper's lien does not revive. (*p*)

If a tradesman, after having manufactured goods intrusted to him by his employer, ship them, in consequence of orders from his employer, on board a certain vessel, to be forwarded to his employer in London; and no bill of lading is signed by the captain at the time of the shipment; and the tradesman, upon the bankruptcy of his employer, soon after the vessel sails, follow and procure the captain, when on his voyage, to sign a bill of lading to him the tradesman or his order; and by means of such bill of lading, obtain possession of the goods on their arrival in London, his lien does not revive. (*q*)

If an insurance-broker part with the possession of a policy upon which he has a lien; and afterwards upon hearing reports not favorable to the circumstances of his principal, he obtain from him the policy under pretence of receiving the average, it has been decided that his lien revives. (*r*)

It seems that if a broker part with a policy his lien revives upon its being returned to him. (*s*)

If a principal send goods to his factor for sale, and the broker sell them in his own name on credit, and the purchaser afterwards put the goods into the hands of the same broker for sale, the broker has not a lien on such

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(*p*) *Jones v. Pearl*, 1. Str. 556. (App. 6.) *Jones v. Thurloe*, 8. Mod. 171. (App. 6.)

(*q*) *Sweet v. Pym*, 1. East, 4. (App. 37.)

(*r*) *Whitehead v. Vaughan*, 1785, *Cooke*, 579. (App. 20.) See note (*s*).

(*s*) *Levy v. Barnard*, 2. Moore, 34.

goods for the debt due from the purchaser for the purchase of the goods. (s)

If a broker sell in his own name two parcels of goods, the property of two different employers, who are respectively indebted to him, and soon after the sale the purchaser deliver one of the parcels to the same broker to sell as his broker, he, the purchaser, being indebted only for both parcels which he purchased, the broker has not a lien upon the parcel so re-delivered to him, for the purchase-money of the two parcels. (s)

If a person send his carriage to a coachmaker's to be repaired, and after the repairs are completed the proprietor give a bill of exchange in payment, and the carriage remain by the permission of the coachmaker in his yard, and the proprietor frequently take it out of the yard, and return it, it has been ruled that the coachmaker has not any lien for repairs. (t)

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(s) *Houghton v. Matthews*, 3. Bos. and Pul. 485. (App. 72.)

(t) Per Lord Ellenborough in *Hartley v. Hitchcock*, 1. Starkie, 408.



## CHAPTER II.

**The Claimant must have some unsatisfied demand.**

A person has a lien upon property placed in his possession as a consideration for his acceptance of a bill, which he is liable to pay. (*t*)

A factor may become surety for his principal on condition of having a lien upon the property of his principal, as an indemnity against any loss which he may sustain by becoming surety. (*u*)

It has been ruled, that if goods are received by a carrier on the road, and the owner is ready at the inn to receive them, the carrier has not a lien either for booking or for warehouse room. (*x*)

If the drawer, the payee, and the acceptor of a bill of exchange become bankrupts after the bill is negotiated, and if the payee be in possession of property of the drawers, who in the event of the bill being proved against the estate of the payee, will be indebted to the payee; it has been agitated whether the assignees under the commission against the payee have any lien arising from the possibility of such debt. (*y*)

If a merchant abroad direct his correspondent in England to effect an insurance on goods at sea, and the correspondent employ a broker to effect the insurance which he does effect in the name of the correspondent, and debit him with the premiums, and deliver him the policy,

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(*t*) *Hammonds v. Barclay*, 2. East, 227. (Appendix, 46.)

(*u*) *Drinkwater v. Goodwin*, Cowp. 251. (App. 18.)

(*x*) *Lambert v. Robinson*, 1. Esp. 119. See *Bishop v. Ware*, 3. Camp. 360. (App. 138.)

(*y*) *Walker v. Birch*, 6. Term Rep. 258. (App. 31.)

and the merchant abroad pay without notice to the broker the premiums to his correspondent, and the correspondent pay to the broker, with whom he has an open account, a greater sum than was due from the correspondent to the broker at the time the premiums are debited, and the correspondent afterwards deliver the policy to the broker to procure an adjustment of a loss; the broker has not a lien against the foreign merchant for the premiums. (z)

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(z) *Levy v. Barnard*, 2 Moore, 34.

## CHAPTER III.

**Extent of Possessor's power.**

The questions upon this head are :

1. A POWER OF SALE.
2. A POWER OF USING THE CHATTEL.
3. A POWER OF ASSIGNING THE CHATTEL.
4. POWER OF HOLDING IT TO THE INJURY OF THIRD PERSONS.

## POWER OF SALE.

In general a lien does not give a right to sell. (a)

Where keeping the goods is not attended with expense, a lien does not give a right to sell. (b)

In general an innkeeper cannot sell the horse, and pay himself. (c)

By the custom of London an innkeeper may sell the horse when he is likely to consume his value. (d)

An innkeeper cannot by the custom of London sell the horse of a stranger. (e)

It has been ruled that if goods are deposited by way of security for a loan, the lender may upon default of payment, sell the goods. (f)

(a) D. Gibbs, C. J. *Pothonier v. Dawson*, 1. Holt, 383. (App. 170.) *Hostler's Case*, Yelv. 66. (App. 1.)

(b) *Hostler's Case*, Yelv. 66. *Hartop v. Hoare*, 3. Atk. 43. (App. 8.)

(c) *Jones v. Thurlloe*, 8. Mod. 171. (App. 6.) *Jones v. Pearl*, 1. Str. 556. (App. 6.)

(d) *Hostler's Case*, Yelv. 66. *Moss v. Townsend*, 1. Buls. 207. (App. 2.) *Robinson v. Walter*, 3. Bulstr. 369.

(e) 2. Roll. Abr. 85.

(f) Per Gibbs, C. J. *Pothonier v. Dawson*, 1. Holt, 383. (App. 170.)

**POWER OF USING THE CHATTEL.**

Where a person has a lien by the act of the party, it has been said that he may use it as the owner would, as a horse or an ox, or milking a cow, unless it will be worse for the usage, as clothes, &c. (g)

**POWER OF ASSIGNING THE CHATTEL.**

A pawnee may assign the pawn to the extent of his interest. (g)

**POWER TO HOLD THE CHATTELS TO THE INJURY OF THIRD PERSONS.**

If goods of different freighters are thrown overboard in a storm: an individual freighter cannot restrain the master from parting with the goods until contribution is made. (i)

The master of a ship, who has a lien on the cargo, cannot detain the goods on board the ship till the payments are made. (k)

The practice is to send the goods to a wharf, and order the wharfinger not to part with them till the freight and other charges are paid. (l)

When the client is bound to produce a deed for the benefit of a third person: the solicitor who has a lien upon it is also bound to produce it for the benefit of such person. (m)

(g) *Mores v. Conham, Owen*, 123. (App. 1.)

(i) *Hallet v. Bousfield*, 13. Ves. 187.

(k) *Abbot*, 245. The reason which *Abbot* assigns is, "as the merchant would then have no opportunity of examining their condition."

(l) *Abbot*, 246.

(m) *Furlong v. Howard*, 1804, 2. Schoales, 115. (App. 37.)

## Part II.

### Different sorts of Lien:

#### CHAPTER I.

#### Liens by Custom.

##### § 1.

##### LIENS BY GENERAL CUSTOM.

The cases upon this subject are :

1. Property which the claimant was compelled to receive.
2. Property taken by legal process.
3. Trade liens.
4. Liens on property found.
5. General cases.

##### PROPERTY WHICH THE CLAIMANT WAS COMPELLED TO RECEIVE.

If a person be obliged by law to receive goods, he has a lien upon them for any debts contracted in the execution of the purpose for which he is obliged to receive them. (*n*)

An innkeeper has a lien upon the goods of a guest for his bill. (*o*)

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(*n*) *Naylor v. Mangles*, 1. Esp. 109. *Rushforth v. Hadfield*, 6. East, 519. (App. 102.) *Yorke v. Grenaugh*, 2. Lord Raym. 866. (App. 4.)

(*o*) *Yorke v. Grenaugh*, 1. Lord Raym. 866. *Naylor v. Mangles*, 1. Esp. Ca. 109. (App. 31.) *Jones v. Thurlow*, 8. Mod. 172. (App. 6.) *Case de Hosteler*, 3. Jac. Yelv. 66. (App. 1.) *Robinson v. Walton*, 14. Jac. 3. Buls. 269.

It has been said that an innkeeper has a lien upon the horse only for the food of the horse, and not for the food of the guest. (p)

If the owner of a horse direct an innkeeper who has a lien upon it not to give it any more food, he may supply it with more food at the charge of the owner. (q)

A traveller who, without entering the inn, leaves his horse, is a guest so as to entitle the innkeeper to a lien. (r)

If goods are left in an inn by a traveller who does not enter the inn, the innkeeper it seems has not a lien. (r)

An innkeeper has a lien without making a demand for payment. (s)

Although the traveller has stolen the horse, the innkeeper has a lien against the right owner. (s)

It has been said, that an innkeeper has a lien upon the person of his guest. (t)

If any innkeeper or alehouse-keeper sell any ale or beer in any vessel not signed, stamped, or marked according to the provisions of 11. and 12. Wm. III. c. 13. s. 1., or if in giving any account or reckoning, he refuse to give in the particular number of quarts or pints of ale or beer for which the demand is made, he cannot for default of payment of such reckoning detain any thing belonging to the person from whom such reckoning is due.

A common carrier, that is, a person who undertakes to carry goods for hire either by land or water, has a lien

(p) *Rosse v. Branstead*. 2 Roll. Rep. 438. 2. Roll. Abr. 85.

(q) *Gilbert v. Berkeley*, Skyn. 648.

(r) *York v. Grindstone*, 1. Salk. 388. (App. 4.) *Yorke v. Grenagh, Ld. Raym.* 866.

(s) *Yorke v. Grenagh, Ld. Raym.* 866.

(t) *D. Arg. Newton v. Trigg*. 1. Shower, 269.

for the carriage upon the goods intrusted to him to deliver. (z)

Although a carrier receive the goods from a person who stole them, he has a lien against the right owner. (a)

A farrier has such lien. (b)

PROPERTY TAKEN BY LEGAL PROCESS.

If a horse is distrained to compel an appearance in a hundred-court, there is not any lien, after appearance, for the keep. (c)

If the lord of a manor seize a beast as an estray, and keep it for some time after having proclaimed it: he has a lien for the keep. (d)

TRADE LIEN.

It seems that every tradesman has a lien upon property intrusted to him in the course of his trade, for debts contracted in the execution of the very purpose for which the property was intrusted. (e)

It has been said that a livery-stable keeper has not a lien upon a horse for his keep. (f)

(z) *Skinner v. Upshaw*, Lord Raym. 752. (App. 4.)

(a) *Yorke v. Grenaugh*, Lord Raym. 866. (App. 4)

(b) *Bac. Abr. Trover* E. 694. *Yelv.* 67.

(c) *B. N. P.* 45. But if a horse be distrained in order to compel an appearance in a hundred-court, after appearance the plaintiff cannot justify detaining the horse till paid for his keeping.

(d) *Taylor v. Jones*, 2. *Roll. Abr.* 92. 3. *Bac. Abr. Trover.* *B. N. P.* 45, where it is thus stated:—"A lord of the manor seized a beast as an estray, and kept it for some time after having proclaimed it. The owner afterwards, and within the year and day, claimed it, and brought trover without first tendering a satisfaction for the keeping of it: and for the want of that it was holden that the action would not lie."

(e) *Ex parte Deeze*, 1. *Atk.* 228. *Ex parte Ockenden*, 1. *Atk.* 235.

(f) It is said to have been ruled by Lord Kenyon in *Hunter v. Berkley*, *Esp. N. P.* 583. The privilege of retainer is confined to innkeepers; for a livery-stable keeper has no such privilege to detain a horse for his keeping: for it is allowed to innkeepers on the ground of their being obliged to receive guests and their horses;

## LIEN ON PROPERTY FOUND.

A man who finds the property of another which happens to have been lost or mislaid, (g) and voluntarily puts himself to some trouble and expense to preserve it, and to find the owner, has not a lien upon it for the recompense which he may reasonably deserve. (h)

If timber is placed in a dock on the banks of the Thames, and the ropes with which it is fastened accidentally get loose, and the timber float, and is carried down by the tide, and left at low water upon a towing-path on the banks: and a person remove the timber to a place of safety, he has not a lien upon the timber for his trouble and expenses. (h)

The finder of a horse has not a lien upon it for his expenses. (h)

The finder of a dog has not a lien upon it for its keep. (l)

A person, who by his own labour preserves goods, which the owner, or those intrusted with the care of them, have either abandoned in distress at sea, or are unable to protect and secure, has a lien upon the goods for a proper compensation for his trouble. (m)

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but that is not the case of livery-stable keepers who rely on the contract. Per Holt, C. J. in *York v. Grenough*, Lord Raym. 868. Lord Holt says, "The livery-man cannot retain for the meat, but has a remedy upon the contract: for he is not compellable to receive such horse: but Q. Do not liens exist in almost every trade, where the tradesman cannot be compelled to receive the articles? 2. Esp. N. P. 90. *Hunter v. Berkley*, Esp. N. P. 583. Lord Kenyon. Q. Whether, (admitting that a livery-stable keeper is not within that class of cases where the lien arises from the obligation of the party to receive goods,) there is any difference between the case of a livery-stable keeper and any other tradesman who receives them optionally.

(g) These words are inserted to distinguish this class of cases from the cases in salvage.

(h) *Nicholson v. Chapman*, 2. H. Blackst. 254. (App. 24.)

(i) *Bucks v. Bristead*, 2. Blackst. 1171, (App. 19.) cited in *Nicholson v. Chapman*. 2. Hy. Blackstone, 254. (App. 24.)

(m) *Hartford v. Jones*, 1. Lord Raym. 393. (App. 4.) *Baring and others v. Day*,



## GENERAL CASES.

If the captain bring a small consignment on his own account, and a large consignment for the owner, and the owner enter the whole cargo at the custom-house, pay the duty, and have the whole delivered out to him, it has been decided that the owner has not against the captain, a lien on his consignment for the duty. (n)

The surveyor of the queen's works has not a lien upon the tools of a carpenter to enforce him to continue until the queen's work is completed. (o)

It seems to have been doubted whether there is a lien for warehouse-rent. (p)

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8. East, 57. See *Hamilton v. Davies*, 5. Burr. 2732. Abbot, 283. As to the amount of the compensation and the modes of recovering it, see Abbot, 284 and 5.

(n) *Stone v. Lingwood*, 1. Strange, 651. (App. 7.)

(o) *Baldwin v. Cole*, 6. Mod. 212. (App. 4.)

(p) *Boardman v. Sill*, 1. Camp. 410. sect. 2. (App. 120.)

## § 2.

## LIEN BY SPECIAL CUSTOM.

A lien by special custom is a right to retain for more than the debt contracted in the execution of the purpose for which the property was intrusted.

The existence (*q*) and extent of a lien by special custom, are matters of evidence.

The proof of a lien by special custom for a general balance cannot be established by a few recent instances of the detention of goods by a few carriers for their general balance. (*r*)

If a carrier claiming a lien by special custom for his general balance, prove that he has frequently retained goods for his general balance, and various common carriers, who have followed their occupations from twenty to thirty years and upwards, depose generally to their custom of retaining for their general balance, and specify various instances within twelve years, and one instance so far back as thirty years, and the jury, upon this evidence, negative the custom, the court will not grant a new trial. (*s*)

When the right to a general lien has been frequently proved, it cannot be disputed. (*t*)

A lien by special custom for a general balance is not favoured by the courts. (*u*)

(*q*) *Ex parte Deeze*, A. D. 1748, 1. Atk. 228. (App. 9.) with the comment upon it in *Ex parte Ockenden*, A. D. 1754, 1. Atk. 235. (App. 11.) See also *Ex parte Ockenden and Downman*, Prec. in Ch. 580, cited in *Ex parte Ockenden*. See *Naylor v. Mangles*, 1. Esp. Ca. 109. (App. 31.) *Oppenheim v. Russel*, 3. Bos. and Pull. 42.

(*r*) *Rushforth v. Hadfield*, 6. East, 519. (App. 102.)

(*s*) *Rushforth v. Hadfield*, 6. East, 526. 7. East, 224.

(*t*) *Naylor v. Mangles*, 1. Esp. 109. *Spears v. Hartley*, 3. Esp. 81. (App. 38.)

(*u*) *Rushforth v. Hadfield*, 6. East, 526. 7. East, 224. See Note (*b*), ante, page 1.

## WHAT PERSONS HAVE OR HAVE NOT A GENERAL LIEN.

Who have a general lien.	Who have not a general lien.	Cases unsettled.
Attornies. (a) Bankers. (b) Brokers. (c) Calico-printers. (d) Factors. (e) Fullers in some places. (f) Packers. (g) Wharfingers. (h)	Common carriers. (i) Innkeepers. (k) Millers. (l) Printers. (m)	Dyers. (n)

(a) *Ex parte Nesbitt*, 2. Sch. and Lef. 279. *Ex parte Stirling*, 16. Ves. 259. *Ex parte Pemberton*, 18. Ves. 382.

(b) *Jourdain v. Lefevre*, 1. Esp. Cas. 66. *Davis v. Bowsher*, 5. Term Rep. 488. *Scott v. Franklin*, 1812, 15. East, 428. See *Vanderheyden v. Willie*, 3. Bro. 21.

(c) *Whitehead v. Vaughan*, Cooke, 579. *Parker v. Carter*, Cooke, 602. *Manns v. Henderson*, 1. East, 335. See 3. Esp. 182. *D. Lord Ellenborough*, *Scott v. Franklin*, 15. East, 434.

(d) *Ex parte Andrews*, Cooke, 460. *Weldon v. Gould*, 3. Esp. 268.

(e) *Kruger v. Wilcox*, A. D. 1755. Amb. 252. *Goding v. London Assurance*, Burr. 494. A. D. 1758. *Green v. Farmer*, A. D. 1768. 1. Blackst. 651. *Drinkwater v. Goodwin*, A. D. 1775, Cowper, 251. *D. Ashhurst*, *J. Kinlock v. Craig*, 3. Term Rep. 119. *D. Lord Kenyon*, *Walker v. Birch*, A. D. 1795, 6. Term Rep. 258.

(f) *Sweet v. Pym*, 1. East, 4.

(g) *Ex parte Deeze*, A. D. 1748, 1. Atk. 228. See in *Ex parte Ockenden*, A. D. 1754, 1. Atk. 235, where the Chancellor says, In *Ex parte Deeze* there was evidence that it is usual for packers to lend money to clothiers, and the cloth to be a pledge not only for the work done in packing, but for the loan of money likewise. In *Green v. Farmer*, 1. Blackst. 651, A. D. 1768, Lord Mansfield says, A packer, according to the course of trade, is certainly entitled to a lien upon all goods in his hands, being in the nature of a factor.

(h) *Naylor v. Mangles*, 1. Esp. 109. *Spears v. Hartley*, 3. Esp. 81.

(i) *Kirkman v. Shawcross*, A. D. 1794, 6. T. R. 14. *Aspinall v. Pickford*, A. D. 1800, 3. Bos. and Pull. 44. *Oppenheim v. Russel*, A. D. 1802, 3. Bos. and Pull. 42. *Rushforth v. Hadfield*, A. D. 1805, 6. East, 519. 7. East, 224. See 6. East, 25. in note.

(k) *Jones v. Thurlow*, 9. G. II. 8. Mod. 172.

(l) *Ex parte Ockenden*, 1. Atk. 238.

(m) As it seems by *Blake v. Nicholson*, 3. Maule and Selw. 167.

(n) *Green v. Farmer*, 8. G. III. 1. Bl. 651, it was decided that there was not any

## TO WHAT DEBTS A LIEN FOR A GENERAL BALANCE EXTENDS.

It has been said that a factor has not any general lien

such lien. Since that time the following cases have been decided. In *Rushforth v. Hadfield*, 1805, 6. East, 519, it was said in argument, At the time of *Green v. Farmer*, in 1768, it was holden that a dyer had no lien for his general balance, but only for the dyeing of the particular goods, though since that such a lien has been established. In a note to *Rushforth v. Hadfield*, 6. East, 522, Mr. East says, The same was said in the argument of the case of *Whitehead and others, assignees of Mitford v. Vaughan*, T. 25. Geo. III. B. R. which turned upon the lien of a policy-broker, that since the case of *Green v. Farmer* dyers had been ruled to have a lien for their general balance: but I have not been able to meet with any such case; nor was there any allusion made to it in *Kirkman* and another, assignees of *Walker v. Shawcross*, 6. Ter. Rep. 14, where the dyers, dressers, whisters, printers, and calenders of Manchester and its neighbourhood established a lien for their general balance, upon proof of a special advertisement to that effect, and notice of it by the contracting party. And in *Close* and another, assignees of *Ridell v. Waterhouse* and others, which was trover for woollens delivered by the bankrupt before his bankruptcy to the defendants, dyers at Halifax, to be dyed: where a tender had been made of the price of dyeing the particular goods, but the defendants claimed to retain for their general balance for the expense of dyeing other goods, on the ground of usage; the jury at the trial, before *Rooke, J.* at York, negatived any such usage at Halifax, and found a verdict for the plaintiffs: and on a motion for a new trial in T. 42. Geo. III. the Court of K. B. finally discharged the rule, being of opinion that, as the usage was negatived, the defendants could not retain for the price of dyeing any other than the particular goods, or at most only for the dyeing of such goods as were delivered to them at one and the same time under one entire contract: and that at any rate the circumstance of the defendants having had different parcels of goods in their hands at one time which had been delivered at several times, did not give them a lien on the goods in question remaining in their hands for the price of dyeing such other distinct parcels. In *Olive v. Smith*, 4. Taunt. 60. *Gibbs, C. J.* says, My Lord Chief Justice has told me that early in his life, in the very teeth of *Green v. Farmer*, he and the late Lord Ashborton proved a custom for dyers to have a lien for their general balance, and I have myself proved that custom several times since. In *Saville v. Barchard*, 41. Geo. III. 4. Esp. 53. In this case upon the evidence adduced, Lord Kenyon ruled that the defendant had such lien for his general balance. The next case is *Humphreys v. Partridge*, before Mr. J. Lawrence, Gloucester Summer Assizes, 1803. The only point agitated was a dyer's right to retain for his general balance: nearly all the dyers in Gloucestershire, and some dyers from other counties, were examined. Mr. J. Lawrence said, he thought the custom was proved: and *Green v. Farmer* being cited on the other side, he said that, in several subsequent cases the custom had been established. The dyers had a verdict. Serjeant Williams and — for the plaintiff. Mr. Mills and Mr. Dauncey for the defendants.

in respect of debts which arise prior to the time at which his character of factor commences. (x)

It has been said that a factor's lien for a general balance does not extend to all debts, but is confined to trade debts. (y)

It has been ruled that a lien for a general balance extends only to work done in the course of the business for which the lien is claimed, but does not extend to money lent or any collateral debt. (z)

Packers have a general lien extending to money lent. (a)

Calico-printers have a lien for a general balance for work done in the course of business, but not for money lent or any collateral cause. (b)

If the statute of limitations has run against a demand, and the creditor obtain possession of goods upon which he has a lien for a general balance, it has been ruled that the lien extends to the demand barred by the statute. (c)

It has been doubted whether the lien of a factor extends to debts which arose prior to the time at which the character of factor commenced. (d)

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(x) *Houghton v. Matthews*, 3. Bos. and Pull. 485. (App. 72.)

(y) *D. Chambre J. Houghton v. Matthews*, 3. Bos. and Pull. 495. In *Olive v. Smith*, 1813, 4. Taunton, 57. Gibbs, J. thought that, although a policy broker had a lien for his general balance on policy account, it did not extend to any other debt.

(z) Per Lord Kenyon, *Weldon v. Gould*, 3. Esp. 268. (App. 40.)

(a) *Ex parte Deeze*, 1. Atk. 228. (App. 9.) *Ex parte Ockenden*, (App. 11.) 1. Atk. 233. *Green v. Farmer*, 1. Blackst. 651. In *Houghton v. Matthews*, Lord Alvanley, when speaking of *Ex parte Deeze*, says, "I can hardly conceive the case *Ex parte Deeze* to be well reported: for, according to the report, Lord Hardwicke seems to suppose that in cases of bankruptcy, if a person has a lien to a certain amount, there is no harm in giving him a lien to the whole amount of his claim. But to such a proposition no lawyer can assent."

(b) *Weldon v. Gould*, 3. Esp. 268. (App. 40.)

(c) Per Lord Eldon, *Spears v. Hartley*, 3. Esp. 81. (App. 38.)

(d) In *Houghton v. Matthews*, 3. Bos. and Pull. 485, Chambre J. says, "I do not find any authority for saying, that a factor has any general lien in respect of debts

## CHAPTER II.

## Lien by Agreement. (c)

A lien may be created by agreement where no lien would exist by operation of law. (c)

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which arise prior to the time at which his character of factor commences : and if a right to such a lien is not established by express authority, it does not appear to me to fall within the general principle upon which the liens of factors have been allowed. It seems to me that the liens of factors have been allowed for the convenience of trade, and with a view to encourage factors to advance money upon goods in their possession, or which must come to their hands as factors ; but debts which are incurred prior to the existence of the relation of principal and factor, are not contracted upon this principle. And if the lien now contended for were allowed, instead of inducing persons to place goods in the hands of factors, it would operate the contrary way, since it would tend to prevent insolvent persons from employing their creditors as factors, lest the goods intrusted to them should be retained in satisfaction of former debts." And in the same report Lord Alvanley says, " If a debt be due from the principal to the factor, antecedent to the time of the particular goods being put into the hands of the latter, he is entitled to retain them as a security. And if a man commence dealing with a factor, to whom he is indebted on bond, I am not prepared to say that the lien of the factor would not attach upon such debt."

(c) In *Wilson v. Heather*, 4 Taunt. 642, Gibbs, C. J. makes a distinction between a lien and a pledge ; that is, between a lien by operation of law, and a lien by agreement ; he says, " The right of lien does not arise out of any contract whatsoever but out of a right to hold property till the party claiming the lien has been paid for the operation he performs. I think it has been held, that if a person agrees to do the work for a specific sum, he loses his lien. This is a deposit for a sum lent on the ship : that is not strictly a lien." And Heath, J. says, " The calling it a lien will not make it such. This is no lien ; it is a pledge."

It is usual to speak of lien by contract, though that is more in the nature of an agreement for a pledge. Lien, in its proper sense, is a right which the law gives. But it is usual to speak of lien by contracts, though that is more in the nature of an agreement for a pledge. Taken either way, however, the question always is, whether there be a right to detain the goods till a given demand shall be satisfied. That right must be derived from law or contract.—*D. Master of the Rolls in Gladstone v. Birley*, 2 Merivale, 404.

(c) *Kirkman v. Shawcross*, A.D. 1794, 6 Term Rep. 14.

## LIEN BY AGREEMENT EXPRESSED.

If a debtor, after having deposited title-deeds as a security for a specific sum, borrow an additional sum upon the representation that the security is sufficient to cover the additional advance, the lien extends to the whole debt. (*f*)

If a creditor who has an equitable lien on a lease make further advances upon an uncontradicted parol agreement, that the lien shall extend to such advances, the equitable lien extends to the whole. (*f*)

A mortgage constituted by contract in writing, cannot be extended by parol to subsequent advances. (*h*)

A security to one firm cannot, as it seems, be extended by parol to a new firm, consisting of the old members, with the substitution of a new member for one of the old members who has seceded. (*i*)

If the customer of a banking-house give a security to the members of the firm; and if, after the firm is altered by the secession of one of the members and the admission of a new member, the customer write a letter to the new firm asking for their acceptances for 2,000*l.*, in which letter he says, "as we have kept an account with you for many years, and as the value of the estate of which you have the title-deeds, and ——'s acceptances are together of greater value than the amount of your acceptances will be, together with the 2,000*l.* now asked for;" the new firm has a lien for advances beyond the 2,000*l.* subsequent to the date of the letter. (*i*)

(*f*) Ex parte Langston, 1809, 17. Ves. 231. 1. Rose, 26. See also ex parte Kensington, 1813, 3. Beames, 80.

(*h*) D. Lord C. Ex parte Hooper, 2. Rose, 329. 1. Merivale, 7.

(*i*) Ex parte Marsh, 2. Rose, 240.

If a number of tradesmen, not compellable to receive goods, (*m*) agree not to receive goods to be manufactured in the course of their trade, unless upon express condition that there shall be a lien on the goods, not only for the debts accruing in the execution of the purpose for which the goods were intrusted, but also for the general balance due from their employers for work and labour of the same kind performed upon goods which have already been delivered out of their possession; such agreement is valid and obligatory upon those employers who have notice of it. (*n*)

The same agreement may be made by an individual. (*n*)

Whether such an agreement made by a common carrier or innkeeper and the owner of the goods, is valid, seems not to be finally settled. (*n*)

#### LIEN BY AGREEMENT IMPLIED.

A contract of lien may be implied from the nature of the particular mode of dealing between the parties. (*o*)

A creditor who has goods deposited as a security for a particular debt to be kept as pledged until further orders, seems not to have, by virtue of such deposit, a lien upon such goods for a subsequent debt. (*p*)

Continued dealings between parties, on the ground that they have a lien for a general balance, is evidence that

(*m*) *Kirkman v. Shawcross*, 6. Term Rep. 14. *Oppenheim v. Russell*, 3. Bos. and Pull. 42. (App. 54.)

(*n*) *Kirkman v. Shawcross*, 6. Term Rep. 14. *Oppenheim v. Russell*, 3. Bos. and Pull. 42. (App. 54.) See *Maans v. Henderson*, 1. East, 335. (App. 41.) *Rushforth v. Hadfield*, 6. East, 519. (App. 102.)

(*o*) *Kirkman v. Shawcross*, A. D. 1794, 6. Term Rep. 14.

(*p*) *Birdwood v. Raphael*, 5. Price, 594.



subsequent dealings between the parties are upon the same ground. (q)

The circumstance of a trader's procuring a loan from a creditor who is already in possession of some of the trader's property, seems to be evidence that the property is to be considered a pledge for the whole debt. (r)

A mortgage to a firm of bankers, consisting of three partners, cannot, as it seems, be extended to the firm, with the admission of another partner, although he has only a fixed salary, without being interested in profit or loss. (s)

(q) *Downman v. Matthews*, Prec. Ch. 580. See *Ex parte Ockenden*, 1. Atk. 236. (App. 11.) and *Kirkman v. Shawcross*, 6. Term Rep. 19.

(r) *Demandy v. Metcalf*, Prec. in Chan. 419. cited in *Ex parte Ockenden*, 1. Atk. 235. See *Jones v. Smith*, 2. Ves. Jun. 378. *Adams v. Claxton*, 6. Ves. 229. In *Ex parte Langston*, 1809, 17. Ves. 231. The Lord Chancellor says, "It is not probable that a person having made an advance upon a security which he holds, should make further advances without security."

(s) *Ex parte Browne* in note, 2. Rose, 242.

## Part III.

### Waiver of Lien.

A right to a lien may be waived by agreement. (t)

The cases on this head may be thus exhibited.

- |   |                                 |   |  |
|---|---------------------------------|---|--|
| { | 1. Express agreement of waiver. | { | 1. By previous agreement inconsistent with lien. |
|   | 2. Implied agreement of waiver. |   | 2. By taking security.                           |
|   |                                 |   | 3. By taking the thing for a particular purpose. |

#### EXPRESS AGREEMENT OF WAIVER.

A banker has not any lien for his general balance, upon securities received by him under an agreement to waive his right to a lien. (u)

If an agent for a trader lodge goods for sale with a factor, with whom the trader had no previous dealings as factor, and the factor undertake to pay the proceeds of the goods to the agent; the factor has no lien upon such goods. (x)

(t) *Davis v. Bowsher*, 5. Term Rep. 488. (App. 27.) *Walker v. Birch*, 6. Term Rep. 258. (App. 31.) D. Lord C. in *Cowel v. Simpson*, 16. Ves. 276. (App. 126.) *Ex parte Stirling*, 16. Ves. 258. (App. 125.)

(u) *Davis v. Bowsher*, 5. Term Rep. 488. (App. 27.)

(x) *Walker v. Birch*, 6. Term Rep. 258. (App. 31.) In this case Lord Kenyon says, "It is of little importance whether the factors did or did not know that J. Forbes was the agent of Caldwell and Co."

IMPLIED AGREEMENT OF WAIVER.

Where from the manner of dealing it appears that the creditor relies only on the personal credit of the debtor, it seems that there is not any lien. (t)

If the proprietor of goods demand them from the proprietor of a warehouse where they are situated, who, without demanding any warehouse-rent, refuse to deliver them, saying, that they are his own property, it has been ruled, that in trover for the goods the warehouseman has waived his lien. (u)

If a sole trader deposit two hundred dozen of wine as a security for a loan to him, and he afterwards take a person into partnership with him, and the partners in two or three instances send to the creditor for a portion of the wine, and some dozens are delivered out to the joint order of the firm, it is not a waiver of the lien. (x)

If a bookseller employ a printer to print several numbers, although not consecutive numbers of the same work, and the bookseller supply the paper for printing the numbers from time to time as they are to be printed, and a separate charge is made by the printer for printing each number, and part of the whole demand is paid by the bookseller, the printer has a lien upon all the numbers in his possession for the whole of the residue of his debt. (y)

If a carriage be ordered from a coachmaker, to be paid for partly by a bill on delivery, and partly by a bill at a future day, and the purchaser neglect to take the carriage, and the coachmaker obtain a verdict against the purchaser for goods bargained and sold, the coachmaker

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(t) *Green v. Farmer*, 1. Bl. 651. (App. 17.)

(u) *Boardman v. Sill*, 1. Camp. 410.

(x) *Pothonier v. Dawson*, 1. Holt, 383. (App. 170.)

(y) *Blake v. Nicholson*, 3. Maule and Selwyn, 167. (App. 157.)

has a lien upon the carriage for the sum due: and the sheriff cannot seize it under a *fiery facias* against the goods of the purchaser. (y)

IMPLIED WAIVER BY PREVIOUS AGREEMENT INCONSISTENT  
WITH LIEN.

It seems that a special agreement, unless inconsistent with the continuance of the lien, is not a waiver of the lien. (z)

It seems that an express antecedent contract is a waiver of an implied lien. (a)

(y) *Houlditch v. Desanges*, 2. Starkie, 337.

(z) *Hutton v. Bragg*, 7. Taunt. 14. (App. 72.) *Lens*, Serjt. contended that the proposition had been laid down much too widely by the plaintiff's counsel, that where there was a special agreement, the right of lien could not subsist. To produce that effect, the special agreement must do much more than merely stipulate the price; it must contain some terms inconsistent with the continuance of the lien; for instance, every master of a vessel signs bills of lading, in which there is a specific agreement to deliver to the consignees, "he or they paying freight;" yet that was never held to discharge the lien: but sometimes there is a stipulation that the freight shall be paid at a certain time after arrival: that is wholly inconsistent with the continuance of the lien, and destroys it. So if freight be paid for by a bill which is afterwards dishonored, things revert to their former situation; and if the goods are still in the custody of the ship-owner, the lien continues.—*Gibbs*, Ch. J. It will not be necessary for me to enter into the consideration of the difference between the goods loaded before, and those loaded after the act of bankruptcy; nor to consider the question, inasmuch as some of the goods were delivered on the day of the bankruptcy, whether of those two acts preceded the other. We decide on a general ground. On the question, whether there be or be not any lien whatever in the defendant? The plaintiff contends that the defendant has no lien, on one particular, and one general ground; he insists, on the authority of a case in *Buller's Nisi Prius*, that wherever there is a specific agreement for the price of the thing to be done about the goods, there the party has no lien; that here, by the charter-party, a specific sum is to be paid in a specific manner, and that therefore no lien exists. With respect to that proposition, it is not true that a lien cannot exist where there is a stipulation for a particular sum to be paid for that which is to be done about goods. I am not prepared to say whether a lien may or may not exist, in a case where not only a specific sum, but a specific mode of payment is stipulated for, as for example, by bills payable at certain periods. We decide on the more general ground, that there is no lien whatever under the circumstances of this case. See also the judgment of *Best, J.* in *Crawshaw v. Homfray*, 4. Barn. and Ald. 53.

(a) *Stevenson v. Blakelock*, 1. M. and Sel. 535. (App. 153.)

If an innkeeper receive horses or cattle to pasturage upon an agreement for the payment of a weekly sum, it has been decided that he has not a lien. (b)

If an innkeeper agree with his guest for a fixed sum per day for the keep of his horse, the innkeeper, it has been decided, has not a lien for the expenses. (c)

If the proprietor of a horse agree with a farrier to pay a fixed sum for curing a horse of a distemper, and likewise a reasonable sum for keeping the horse until it be cured, it has been decided that the farrier has not a lien upon it. (d)

If a ship passenger agree to pay a certain sum for his passage, the captain has a lien upon his luggage for his passage-money. (e)

A bill of lading stipulating to deliver the cargo to the consignees, he or they paying freight at a certain time after the arrival of the vessel, seems to be a waiver of the lien. (f)

If a fuller receive goods for the purpose only of dressing he has not a lien upon them for his general balance. (g)

If the proprietor of goods agree to sell them to one of his creditors, and that the purchase-money shall be applied in liquidation of the debt, and the goods are delivered to the factor of the proprietor to sell them and account for the proceeds to the creditor, the factor has not

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(b) *Chapman v. Allen*, Cro. Jac. 271. (App. 3.) *Yorke v. Grenaugh*, Lord Raym. 857. (App. 4.)

(c) *Hostler's Case*, Yel. 66. (App. 1.)

(d) *Brennan v. Currint*, Say, 224. (App. 13)

(e) *Wolf v. Summers*, 2. Camp. 631. (App. 151.)

(f) See *Hutton v. Bragg*, 7. Taunt. 14. (App. 72.)

(g) *Rose v. Hart*, cited 2. Bred. and Bing. 96. See *Sweet v. Pym*, 1. East, 4. (App. 37.)

a lien against the creditor for a general balance due to him from the proprietor. (*h*)

It has been said that a lien is wholly inconsistent with a dealing on credit, and that it can only subsist when payment is to be made in ready money. (*s*)

A shipwright, to whom a ship is delivered to be repaired, where by the usage of the trade, when there is no express agreement as to the time of payment, the shipwright gives credit for the repairs, generally fifteen months, sometimes eighteen months, has no lien on the ship for repairs. (*t*)

#### IMPLIED WAIVER BY TAKING SECURITY.

It has been said that when a person has a lien upon goods in his hands, he forfeits his lien by taking security. (*v*)

If a bill be given in payment which is dishonoured; and the party taking the bill did not agree to run the risk of its being paid; it is not such a payment according to the mode stipulated at the time of sale as to divest a vendor of his lien. (*w*)

If a person agree to buy some plate of a silversmith, and the silversmith send for his engraver to engrave upon the plate the arms of the vendee; and both vendor and vendee direct the engraver to bring back the plate to the vendor, who is to pay for the engraving; and the vendee pay the vendor in notes of a country bank which failed on the next day before they were presented for payment,

(*h*) *Weymouth v. Boyer*, 1. Ves. Jan. 420.

(*s*) D. Lord Ellenborough. *Raitt v. Mitchell*, 4. Camp. 146. (App. 141.)

(*t*) *Raitt v. Mitchell*, 4. Camp. 146. (App. 141.)

(*v*) D. Lord C. *Cowell v. Simpson*, 16. Ves. 276. (App. 126.)

(*w*) *Pickford v. Maxwell*, 6. Ter. Rep. 52. *Owenson v. Morse*, 7. Ter. Rep. 66.

the vendor is entitled to his lien upon the goods, upon their being returned to him by the engraver. (l)

If an attorney take promissory notes payable three years after date for his bill, it has been decided that the client may, before the notes are due, insist upon a delivery to him by the attorney of the different papers, upon which, previous to taking the notes, he had a lien. (m)

If a client accept five bills of exchange at different dates drawn by his attorney for the amount of his costs, of which bills some have been refused payment, and an execution afterwards issue against the client at the suit of one of his creditors, and the client give to his attorney a sum to discharge the debt, and upon payment of such sum to the creditor, the creditor deliver to the attorney a lease which had been deposited by the client with the creditor as a collateral security for the debt, the attorney has a lien upon the lease. (n)

If a banker take a security for part of his debt, and the debtor die, the banker has not a lien upon such security for the residue of his debt. (o)

If a landlord receive acceptances of the father of his tenant on account of rent due from the tenant, in pursuance of a bond of indemnity for the payment of rent and performance of covenants executed by father and son, he does not lose his right to distrain, but may proceed to sale. (p)

If the owner charter a ship, and the freight upon the return of the ship to England is to be paid in good and

(l) *Owenson v. Morse*, 7. Ter. Rep. 64.

(m) *Cowell v. Simpson*, 1809, 16. Ves. 276. (App. 126.) But see next article, and *Stevenson v. Blakelock*, 1. Maule and Sel. 535. (App. 153.)

(n) *Stevenson v. Blakelock*, 1. Maule and Selwyn, 535. (App. 156.)

(o) *Vanderzee v. Willis*, 3. Bro. 30. (App. 23.)

(p) See Bull. N. P. 182. *Drake v. Mitchell*, in *Woodfall's Landlord and Tenant*, p. 580.

approved bills at three months date, and the owner receive bills drawn by the captain in payment, and negotiate them, he waives his lien for the freight. (z)

**IMPLIED WAIVER BY TAKING FOR PARTICULAR PURPOSE.**

If by the course of dealing between a banker and his customer, the customer lodge with the banker from time to time bills payable at future days, and draw upon the banker for any money he wants in advance, and the banker charge no interest on the advances, but select at his pleasure some of the bills near the sum advanced and discount them; and, there being a balance of 100% in favor of the customer, he pays to the banker bills to the amount of 3,000%, and upon his application for another advance, the bankers do advance to him about 1,400%, and enter the discount on certain of the bills selected, he does not waive his general lien on the other bills. (q)

If a person entitled to a general lien receive goods for a particular purpose, it seems that he has not a general lien upon such goods. (r)

(z) *Horncastle v. Farren*, 3. Barn. and Ald. 494.

(q) *Davis v. Bowsher*, 5. Term Rep. 488. (App. 27.)

(r) *Walker v. Birch*, 6. Term Rep. 268. (App. 31.) See ante, 39, note (g).



## Part IV.

### Lien in particular Cases.

#### CHAPTER I.

#### Lien respecting Ships.

It seems that a part owner has not a lien upon the ship against the assignees of a bankrupt part owner in possession. (t)

If the owner of a ship deposit her in the hands of a broker, as the security for a loan, and execute a bill of sale, with an indorsement that the assignment made is a lien or security, with a power of sale to the broker, and there is not any compliance with the registry acts, the broker has not such a possession as to give him a lien. (u)

Doubt seems to have been entertained whether a mere deposit of a ship as security for a loan, will not give to the creditor a lien upon the ship, although there has not been a compliance with the registry acts. (x)

(t) *Doddington v. Hallet*, 1. Ves. 497. *Ex parte Young*, Aug. 1813, *Montagu on Partnership*, vol. 1, note (e), page 181. 2. *Rose*, 41. *Ex parte Harrison*, 2. *Rose*, 76.

(u) *Wilson v. Heather*, 5. Taunt. 642.

(x) In *Wilson v. Heather*, 4. Taunt. 642. (App. 160.) Gibbs, C. J. says, "My brother Lens says, admitting that, nevertheless the defendant has a right to hold the ship till the terms are complied with, (viz. of the payment of the money due to the defendant), on which the vessel was delivered. But I do not think those were the terms on which it was delivered: we must find those terms in the bill of sale, which is an agreement of mortgage. Dallas, J. The case lies in a very narrow compass: the question was, whether this was a mere security for the debt due, or a transfer of the ship: this depends on the facts of the case. It is not a mere deposit for the sum ad-

The cases on this subject may be thus exhibited :

- |   |                          |   |                                 |   |                       |   |                |
|---|--------------------------|---|---------------------------------|---|-----------------------|---|----------------|
| { | 1. On the ship.          | { | 1. For repairs and necessaries. | { | 1. For English ships. | { | 1. In England. |
|   |                          |   |                                 |   |                       |   | 2. Abroad.     |
|   |                          |   | 2. For foreign ships.           |   |                       |   |                |
|   | 2. For wages.            |   |                                 |   |                       |   |                |
|   | 2. On the ship's papers. |   |                                 |   |                       |   |                |
|   | 3. On the cargo.         |   |                                 |   |                       |   |                |

### § 1.

#### LIEN ON THE SHIP.

##### LIEN ON SHIP FOR REPAIRS AND NECESSARIES FOR ENGLISH SHIPS IN ENGLAND.

There is not any lien upon a ship for necessities provided in England, or for repairs done in England, by a tradesman who works upon the ship without taking it into possession. (*a*)

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vanced, but an agreement for the transfer of the ship. The proof is, that a bill of sale is executed : for what purpose, but to transfer the property in the ship ? The indorsement shews it more strongly, reciting that the intent was, that the defendant should sell and convey the ship : how could he convey, unless he had the property in the ship ?

(*a*) *Hoare v. Clement*, 2. Show. 338. *Justin v. Ballam*, Salk. 34, Lord Raym. 809. *Abbot*, 135. *Buxton v. Shee*, 1748, 1. Ves. 184. *Ex parte Shank*, 1. Atk. 234. *Wilkins v. Carmichael*, Doug. 97. *Watkinson v. Barnardiston*, 2. P. Wms. 367, and the note in Cox's edition. *Wood v. Hamilton*, House of Lords, June 15, 1789, *Abbot* in note, 141. *Rich v. Coe*, 1777, Cowp. 636. This was a question whether the owner was liable to an action for necessities for a ship, which was let to the lessee for a term of years. During the judgment Lord Mansfield said, whoever supplies a ship with necessities, has a treble security : 1. The person of the master. 2. The specific ship. 3. The personal security of the owners. The creditors trust specifi-

It has been intimated that a shipwright, who has taken a ship into his own possession to repair it, may have a lien upon the ship. (b)

It seems that a shipwright has a lien upon a ship in his dock when he is to be paid in ready money as soon as the repairs are finished. (c)

If a shipwright to whom a ship is delivered to be repaired, where by the usage of the trade, when there is no express agreement as to the time of payment the shipwright gives credit for the repairs generally fifteen months, sometimes eighteen months, he has no lien on the ship for repairs. (c)

The captain or master has not any lien on the ship or freight for repairs or necessities. (d)

cally to the ship, and generally to the owners. See also D. Lord Mansfield, *Farmer v. Davies*, 1. Term Rep. 109. There is a dictum of Lord Kenyon to the same effect in *White v. Baring*, 4. Esp. 23, but a new trial was granted. It is to be observed upon this dictum as to the lien on the ship, 1st, That it was extrajudicial. In *Westerdell v. Dale*, 1797, 7. Term Rep. 313, Lord Keny. says, other points have been discussed in this case, but it is not necessary to go into them at large, or to give any decisive opinion upon them now. But as some cases have been referred to on these points, I think it proper to observe that, whenever it becomes necessary to decide those questions, those cases may perhaps deserve further consideration. In *Rich v. Coe*, it was said that the person supplying a ship with necessities has a treble security; the person of the master, the ship, and the personal security of the owners; but I doubt whether that doctrine is not too generally laid down. Sir J. Jekyll held in a case before him that the master could not subject the ship if in England, and that was afterwards confirmed by Lord Hardwick. In *Abbot*, 135, he says, (speaking of this dictum of Lord Mansfield in *Rich v. Coe*), But in a recent case to which I have more than once had occasion to refer, Lord Kenyon, alluding to two cases, that will be presently mentioned, expressed a doubt whether the doctrine of Lord Mansfield on this subject was not too generally laid down: and upon the review of the decisions which I am about to quote, one of which was pronounced by Lord Mansfield himself, it appears that the law of England has not adopted this rule of the civil law with regard to repairs and necessities furnished here in England. *Smith v. Plummer*, 1. Barnwell and Ald. 581.

(b) *Abbot*, 135. See *Hussey v. Christie*, 13. Ves. 595. (App. 120.) See *Ex parte Shank*, 1. Atk. 234. (App. 12.)

(c) D. Lord Ellenborough. *Raitt v. Mitchell*, 4. Camp. 146. (App. 141.) ante, 40.

(d) *Hussey v. Christie*, 13. Ves. 594. 9. East, 497. *Smith v. Plummer*, 1. Barn.

LIEN ON THE SHIP FOR REPAIRS AND NECESSARIES FOR  
ENGLISH SHIPS ABROAD.

The master has not any lien upon the ship for money expended or debts incurred by him for the repairs done to the ship upon the voyage. (*f*)

It has been said that a person who repairs a ship in a foreign port, has a lien upon the ship for the value of the repairs. (*g*)

The master when at sea or in a foreign port may borrow upon maritime interest any sum payable at the termination of the voyage, for repairs or victuals, or for any other purpose necessary for the completion of the enterprise, and may pledge the ship and freight, which is called hypothecation. (*h*)

The captain may hypothecate by a bond in a port in Ireland. (*i*)

The master cannot hypothecate the ship for any debt of his own. (*k*)

A contract of hypothecation does not transfer the property of the ship, but only gives the creditor a claim upon it, to be carried into effect by legal process. (*l*)

and Ald. 380. See *Ex parte Halket*, 2. Rose, 194, 229. In *White v. Baring*, 4. Esp. 22. Lord Kenyon ruled that the captain who paid engagements on account of the ships had a lien on the cargo and freight, but a new trial was granted.

(*f*) *Hussey v. Christie*, 9. East, 426. *Smith v. Plummer*, 1. Barn. and Ald. 581.

(*g*) *Ex parte Shank*, A. D. 1754, 1. Atk. 234. But see *Semb. Contra. Ex parte Halket*, 2. Rose, 194, 229.

(*h*) *Molloy*, Book II. c. 11. s. 11. *Abbot*, 153. *Johnson v. Skipper*, 2. Lord Raym. 982. *Wilkins v. Carmichael*, Doug. 101. *Meneton v. Gibbons*, 3. Term Rep. 267.

(*i*) *Meneton v. Gibbons*, 3. Term Rep. 267.

(*k*) *Abbot*, 155.

(*l*) *Abbot*, 156.

The proceeding against the ship is in the Admiralty court. (m)

**LIEN ON THE SHIP FOR REPAIRS AND NECESSARIES FOR  
FOREIGN SHIPS IN ENGLAND.**

It has been decided in a court of Admiralty that a person who has supplied arms and stores in London to a foreign ship has a lien upon the surplus arising from the sale of the ship under a decree of the court in a suit by the mariners for wages. (n)

**LIEN ON THE SHIP FOR WAGES.**

All persons, except the captain, have a lien upon the ship for wages; (o) the captain has not such lien. (p)

The seamen have a lien upon the ship for wages earned in rigging and fitting it out, or for wages due in preparing for a voyage on which the ship does not proceed. (q)

Seamen have a lien for wages due for bringing a ship from one port in England to another. (r)

The consignee of a ship for sale, to whom the ship and the ship's register is delivered, has a lien upon the ship for money which, after her arrival, he pays for seamen's wages and the necessary use of the ship. (s)

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(m) For the mode of proceeding, see Abbot, 154.

(n) John v. Jackson, 3. Robinson, 288. See some observations respecting this decision in Abbot, 144, and note that the master died abroad.

(o) Wilkins v. Carmichael, A. D. 1779, Doug. 101. Watkinson v. Bernardiston, A. D. 1726, 2. P. Wms. 367, in a note to Mr. Cox's edition, where it appears that the captain and seamen were adjudged to have a lien on the ship for wages.

(p) See Abbot, 461, where all the cases are collected. Smith v. Plummer, 1. Barn. and Ald. 581.

(q) Wells v. Osman, 2. Lord Raym. 1044. S. C. 6. Mod. 138. Mills v. Gregory, Sayer, 127. Abbot, 467.

(r) Anon. 1. Vent. 343. Abbot, 461.

(s) Hammonds v. Barclay, 2. East, 227. See note (d), ante, 45.

## § 2.

## LIEN ON SHIPS' PAPERS.

If the owner of a ship authorise a person to take possession of the ship under a power of attorney, that he may be enabled to sell it, he has a lien upon the ship's papers which are in his possession for his charges in unsuccessfully attempting a sale. (*y*)

## § 3.

## LIEN ON THE CARGO.

The lien for the freight is consequential upon the lien on the ship. (*a*)

The captain and the owners have a lien upon the cargo for freight. (*b*)

The ship-owner has no lien for dead freight where the remedy is in damages. (*c*)

All wares and merchandizes landed and warehoused in the East India Docks under the provisions of 54. Geo. III. c. 228, are, when so landed and warehoused, subject to such and the same claim for freight as such goods respec-

(*y*) *Maestaer v. Atkins*, 5. Taunt. 381.

(*a*) D. Lord Ellenborough in *Smith v. Plummer*, 1. Barn. and Ald. 582.

(*b*) *Wilson v. M<sup>c</sup>Taggart*, 1. Maule and Selwyn, 147.

(*c*) *Phillips v. Rodie*, 15. East, 547, Lord Ellenborough says, "What is a lien for freight but a right to detain the goods on board until the freight which has been actually earned upon them, which is always capable of being calculated and ascertained, has been paid, and where the owner of the goods knows what he is to tender? But here the claim to retain is for the amount of damages unascertained, which the parties are entitled to recover for the non-completion of the cargo; commonly called *dead freight*; but it is that term, *freight*, which has misled the defendants; for it is not *freight*, but an unliquidated compensation for the loss of freight, recoverable in the absence and place of freight. See *Birley v. Gladstone*, 3. Maule and Selwyn, 205.

tively were subject or liable to whilst the same were on board the ships, and before the landing thereof. (c)

The owner has not a lien for dead freight or demurrage under a covenant where the freighter binds the goods and merchandizes in the ship in a penal sum for non-performance of the covenants. (d)

If the owner of a ship let her for a voyage, and the freighter covenant to pay a fixed sum for the freight, and the agent abroad of the freighter consign a homeward cargo, and transmit the bills of lading to his brother instead of the freighter whose solvency he suspects; and if the amount of freight stated in the bills of lading be less than the amount in the charter-party, it has been ruled that the owner has not as against the brother, a lien upon the cargo for more than the amount mentioned in the bill of lading. (e)

The owner has not a lien for a sum claimed in respect of goods which were put on board at the loading port, but afterwards relanded and restored to the agent of the freighter under process of law at the loading port. (f)

It has been ruled that the master of a ship has a lien upon the luggage of a passenger, but not upon his person for his passage-money. (g)

It has been ruled that the captain has a lien on the freight for goods furnished to the ship by his direction and on his credit. (i)

The master may detain any part of the merchandize

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(c) 54. Geo. III. c. 228. s. 18. See *Horncastle v. Farren*, 3. Barn. and Ald. 498.

(d) *Birley v. Gladstone*, 3. Maule and Selwyn, 205. 2. Merivale, 401.

(e) *Mitchell v. Scaife*, 4. Camp. 298.

(f) *Birley v. Gladstone*, 3. Maule and Selw. 205. 2. Merivale, 401.

(g) *Wolf v. Summers*, 2. Camp. 631.

(i) *White v. Baring*, 4. Esp. 22. (App. 44.)

for the freight of all that is consigned to the same person. (k)

If the owner of a ship charter her for a voyage, and the charterer is to pay by good bills, it has been determined that the owner has not, upon dishonor of the bills, any lien for the freight. (l)

It has been decided that if the owner charter the ship for an outward and homeward cargo, the master to be at liberty to reserve the cabin for his sole use, and the usual accommodation for his crew and ship's stores, the owner has not a lien for freight. (l)

Ship creditors for repairs have no lien upon the freight on a homeward voyage when the ship is partly sold on the outward voyage. (o)

The master has no lien upon the freight or cargo for repairs or wages for advances made by him abroad. (p)

The cargo may be hypothecated. (q)

Wherever the master may pledge the ship, he may also pledge the freight. (r)

It has been ruled that if the owner of goods send a barge for them whilst they are on board a vessel moored to a quay, the captain has not any lien for wharfage. (s)

A person, who by his own labour preserves goods which the owner, or those intrusted with the care of them, have either abandoned in distress at sea, or are unable to

(k) *Sodergrene v. Flight and another*, Guildhall, T. 1796, cor. Lord Kenyon. Abbot, 245.

(l) *Hutton v. Bragg*, 2. Marshall, 348. (App. 171.)

(o) *By V. C. Ex parte Hill*, 1815, 1. Madox, 61.

(p) *Smith v. Plummer*, 1. Barn. and Ald. 181. (App. 190.)

(q) *The Gratitude*, 3. Rob. 240. *Hussey v. Christie*, 13. Ves. 599. Abbot, 157.

(r) *The Gratitude*, 3. Rob. 240. *The Jacob*, 4. Rob. 345.

(s) *Bishop v. Ware*, 3. Camp. 360. (App. 138.)



protect and secure, has a lien upon them for a proper compensation for his trouble. (t)

Persons who rescue goods from a ship on fire have a lien on the goods for salvage. (u)

The obligee in a respondentia bond in the usual form has not any lien upon the goods or the proceeds arising from the sale of the goods. (x)

**WAIVER OF LIEN RESPECTING SHIPS, &c.**

If goods are removed out of a ship into the West India Docks in obedience to the law, the captain does not part with his lien. (y)

The master cannot detain the goods on board the ship till the payments are made. (z)

The practice is to send the goods to a wharf, and order the wharfinger not to part with them till the freight and other charges are paid. (a)

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(t) *Hartford v. Jones*, 1. Lord Raym. 393. *Baring v. Day*, 8. East, 57. See also *Hamilton v. Davies*, 5. Burr. 2732. *Abbot*, 383. As to the amount of the compensation, and the mode of recovering it, see *Abbot*, 384 and 5.

(u) *Hartford v. Jones*, Lord Raym. 393. (App. 4.)

(x) *Bush v. Fearon*, 4. East, 319.

(y) *Wilson v. McTaggart*, 1. Maule and Selw. 147. Lord Ellenborough, Ch. J. There was also another objection made, viz. that the plaintiffs had parted with their lien by landing the goods at the West India Docks, and therefore there was no continuing lien at the time of the delivery to the defendants, the parting with which, where it still continues, may be a good consideration to raise an implied assumpsit to pay the freight, against the person in whose favour the lien is relinquished. Lord Ellenborough, Ch. J. upon the last objection stated to the jury, that as the goods were removed out of the ship, and deposited at the West India Docks by act of law, he was of opinion it ought not operate to the prejudice of the plaintiff's lien, which therefore still subsisted.

(z) *Abbot*, 245. The reason which Abbot assigns is, "as the merchant would then have no opportunity of examining their condition."

(a) *Abbot*, 246.

## CHAPTER II.

**Lien upon public Documents.**

It seems that a clerk of assize has not any lien upon a record of the court for his fees. (b)

An attorney has not against the assignees any lien upon a commission of bankrupt or upon the proceedings: and the books to which the bankrupt refers at his last examination are part of such proceedings. (c)

Although the solicitor under a commission has not any lien on the proceedings against the assignees, it seems that he may have a lien as against the bankrupt for the costs of a deed of composition to supersede the commission. (d)

If a bankrupt obtain an order for the enrolment of any part of the proceedings, the clerk of the enrolments has not any lien against the assignees for his fees. (e)

There may be a lien upon a ship's register. (f)

The commissioners under a commission of partition cannot refuse to return the commission until their expenses are paid. (g)

(b) *Bury's Case*, 1. *Leach*, C. C. 238. *Doug.* 195, in note.

(c) *Ex parte Learmouth*, Jan. 1807, and constant practice. *Ex parte Hardy*, 1. *Rose*, 395.

(d) *Ex parte Buller*, 1. *Rose*, 134.

(e) *Ex parte Sandison*, 1. *Rose*, 275.

(f) *Maestaer v. Atkins*, 1. *Marshall*, 76. (*App.* 159.)

(g) *Young v. Sutton*, 2. *Vesey and B.* 365.

## CHAPTER III.

## Lien of Attorney.

An attorney has a general (*h*) lien against his client for his costs on all the papers with which he is intrusted by his client, and upon money, or upon a judgment recovered for him. (*i*)

The court seems disposed to favour the lien of an attorney as advantageous both to the solicitor and client. (*k*)

A solicitor who obtains possession of papers as *prochein amy* has not any lien upon them by virtue of such possession. (*l*)

The practice with regard to the lien of an attorney upon papers is not very ancient. (*m*)

If a solicitor receive from his client papers in the course of a cause for the purpose of doing justice to such client, the client is entitled, notwithstanding the solicitor's lien, to a production of the papers in that, although not in any other cause. (*n*)

If a decree is made for an account against an executor

(*h*) See note (*a*), ante, page 29.

(*i*) Anon. 12. Mod. 554. *Park v. Carter*, Cooke, 514. Ex parte Bush, 7. Vin. 74. Ex parte Bell, Aug. 18, 1803, Cooke, 429. *Mitchell v. Oldfield*, 4. Ter. Rep. 123. *Welsh v. Hole*, 1779, Doug. 238. *Taylor v. Popham*, 1808, 15. Ves. 72. *Cowell v. Simpson*, 1809. 16. Ves. 276. Anon. 6. Wm. and M. 1. Lord Raym. 738. *Wilkins v. Carmichael*, 1779, Doug. 104. Ex parte Bryant, 1815, 1. Maddox, 52.

(*k*) See Ex parte Bryant, 1. Mad. 52. See ante, note (*b*), page 1.

(*l*) March 12, 1810. The chancellor decided this point in a cause, the title of which I could not learn: but Mr. Serman, of Gray's Inn, was solicitor on one side, and Messrs. Cooper and Lowe on the other.

(*m*) See Anon. 6. W. and M. 1. Lord Raym. 738. See *Wilkins v. Carmichael*, Doug. 104, (App. 19.) and *Cowell v. Simpson*, 16. Ves. 275. (App. 126.)

(*n*) *Ross v. Loughton*, 1. Ves. and Beames, 350.

with the usual direction to produce all papers, &c., and the defendant become bankrupt, and his assignees are incapable of proving his discharge in the master's office, without certain vouchers which were in the progress of the cause, previous to the bankruptcy, deposited by the bankrupt with the solicitor whom the assignees do not continue to employ, the court will upon the motion of the assignee, order the solicitor to produce and shew to the master all such vouchers, &c. in his possession or power relating to payments made by the defendant on account of the estate of the testator. (o)

A solicitor who has a lien on a deed for his costs is bound to produce it for the benefit of a third person, if his client would be bound to produce it. (p)

The questions upon this subject may be thus arranged :

- |   |                        |                                |
|---|------------------------|--------------------------------|
| { | 1. In general . .      | 1. For what he has a lien.     |
|   |                        | 2. Against whom he has a lien. |
|   |                        | 3. Upon what he has a lien.    |
|   |                        | 4. Mode of securing his lien.  |
|   |                        | 5. Waiver of his lien.         |
| { | 2. In particular cases | 1. Lien of agents.             |
|   |                        | 2. Lien of clerks in court.    |

#### FOR WHAT AN ATTORNEY HAS A LIEN.

An attorney has a general lien. (q)

An attorney has a lien upon all papers in his possession, although his charge is not in the cause for which the papers are delivered. (r)

(o) *Ross v. Laughton*, 1. Ves. and Beames, 350.

(p) *Furlong v. Howard*, 2. Sch. and Lef. 115. (App. 87.) See ante, page 23.

(q) *Ex parte Pamberton*, 1810, 18. Ves. 382. *Ex parte Stirling*, 1809, 16. Ves. 259. (App. 125.) ante 22. *Ex parte Nesbitt*, 1845, 2. Scholes and Lef. 279. (App. 88.)

(r) *Ex parte Nesbitt*, 2. Sch. and Lef. 279. (App. 88.)

**AGAINST WHOM AN ATTORNEY HAS A LIEN.**

Whether an attorney has a lien upon papers the property of third persons has been doubted. (q)

If a tenant for life give deeds into an attorney's hands, he has not a lien upon them against the remainder man. (r)

If deeds are delivered to an attorney to prepare a mortgage, he has not against the mortgagee a general lien for his demand against the mortgagor. (s)

The solicitor of a plaintiff who dies has a lien upon the sum decreed in preference to bond creditors. (t)

**UPON WHAT AN ATTORNEY HAS A LIEN.**

An attorney has a lien on the papers of his client, and upon money, or upon a judgment recovered. (v)

It seems that an attorney has a lien only upon papers which come into his possession as attorney in the course of his professional business. (u)

If a client accept five bills of exchange at different dates drawn by his attorney for the amount of his bill of costs, of which bills some have been refused payment, and an execution afterwards issue against the client at the suit of one of his creditors and the client give to the attorney a sum to discharge the debt, and upon payment of such sum to the creditor, the creditor deliver to the attorney a lease which had been deposited by the client with the creditor as a collateral security for the debt, the attorney has a lien upon the lease. (u)

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(q) See Bac. Abr. Tit. Attorney (f).

(r) *Ex parte Neshitt*, 2. Sch. and Lef. 279. (App. 88.) *Hoare v. Parker*, 2. T.R. 376.

(s) *Lawson v. Dickenson*, 8. Mod. 307. (App. 6.)

(t) *Turwin v. Gibson*, 3. Ask. 720.

(v) See note (i), ante, page 54.

(u) *Stevenson v. Blakelock*, 1. Maule and Selw. 535. (App. 153.)

If a client deliver his own deeds to an attorney to prepare a mortgage, the attorney has against him a general lien on such deeds. (y)

An attorney has not any lien upon the commission of bankruptcy or the proceedings; and the books to which the bankrupt refers in his last examination are part of such proceedings. (z)

Although the solicitor under a commission has not any lien on the proceedings against the assignees, it seems that he may have a lien against the bankrupt for the costs of a deed of composition to supersede the commission. (a)

If costs upon a bankrupt petition be ordered to be paid to a client against whom a commission afterwards issues before the costs are taxed, the solicitor has a lien upon such costs. (b)

If an executrix be indebted to the estate, and entitled under the will to an annuity, her solicitor has a lien for his costs upon any payment of the annuity to which the executrix may be entitled, after payment of what may be due from her to the estate. (d)

In the Court of King's Bench (e) the attorney's lien upon the judgment of his client must be first satisfied before the opposite party can set off any debt due to him from the client; but in the Court of Common Pleas, (f)

(y) *Ex parte Stirling*, 16. Ves. 258. (App. 125.)

(z) *Ex parte Learmouth*, Jan. 1807, and constant practice. *Ex parte Hardy*, 1. Rose, 395. See ante, page 53.

(a) *Ex parte Buller*, 1. Rose, 134.

(b) *Ex parte Castle*, 1809, 15. Ves. J. 542.

(d) *Skinner v. Sweet*, 1818, 3. Mad. 244.

(e) *Mitchell v. Oldfield*, 4. Term Rep. 123. *Randal v. Fuller*, 6. Term Rep. 456. *Glaister v. Hewer*, 8. Term Rep. 69. *Moreland v. Lashley*, 2. H. Blackst. 441. *Middleton v. Hill*, 1. Maule and Selw. 240.

(f) *Roberts v. Figgs*, 28. Geo. II. 2. Barnes Suppl. 12, cited by counsel in *Thurstout v. Crafter*, C. P. 2. Blackst. 826. *Schoole v. Noble and others*, 1. H. Blackst. 23. A. D. 1788. *Nunes v. Modigliani*, 1. H. Blackst. 217. A. D. 1789.

and in Chancery (g) the attorney's lien extends only to the difference after the demands between the parties are satisfied.

**ATTORNEY'S MODE OF SECURING HIS LIEN UPON THE JUDGMENT.**

An attorney may obtain an order to stop his client from receiving money recovered in a suit upon which he has a lien. (h)

If a client upon changing his attorney obtain an order that his old attorney's bill shall be taxed, and that he shall deliver up all books, &c., the old attorney is entitled to the order with the prothonotary's allocatur endorsed thereon. (i)

If a client change his solicitor the old solicitor cannot prevent the hearing of the cause in equity as a mode of enforcing his lien. (k)

An attorney cannot be defeated of his lien by a collusive settlement between the clients. (l)

The clients may by a composition or any reasonable consideration for the costs settle the suit but not by a mere voluntary release. (m)

If a defendant, against whom judgment is obtained, pay without fraud the amount to the plaintiff, before he

*Vaughan v. Davies*, 2. H. Blackst. 440. *Denie v. Elliott*, 2. H. Blackst. 589, A. D. 1705. *Hall v. Ody*, 2. Bos. and Pull. 28. A. D. 1799.

(g) *Taylor v. Popham*, 13. Ves. 59, 15. Ves. 72. *Ex parte Castle*, 15. Ves. 539.

(h) *D. Lord Mansfield, Wilkins v. Carmichael*, Doug. 104. *Welsh v. Hole*, Doug. 239.

(i) *Alger v. Hifford*, 1. Taunt. 38.

(k) *O'Dea v. O'Dea*, 1. Sch. and Lef. 315. *Merywether v. Mellish*, 13. Ves. 161. *Twort v. Darell*, 13. Ves. 195.

(l) See *Anon*, 1750, 2. Ves. Sen. 25. *Welsh v. Hole*, 1779, Doug. 238. *Read v. Dupper*, 1795, 6. Term Rep. 361. (App. 36.) *Omerod v. Tate*, 1801, 1. East, 64. (App. 43.) *Swain v. Senet*, 1806, 2. N. R. 99.

(m) *Anonymous*, 2. Ves. 25.

has notice of the attorney's lien, the payment is good. (n)

If the clients compromise without notice of the lien, it has been determined that the compromise is valid. (o)

If a plaintiff who is a prisoner call upon one of the bail for the defendant, and propose to settle the action by payment of part of the debt, to which the bail agrees, and the defendant's attorney attend with the plaintiff and settle the debt in pursuance of the agreement without any notice to or from the plaintiff's attorney, he may proceed to judgment, and issue a *scire facias* for his costs against the bail. (p)

If a sum is awarded to be paid by a defendant, and the plaintiff's attorney give notice to the defendant not to pay it to the plaintiff as he has a lien for his costs, and the defendant pay the plaintiff notwithstanding such notice he is liable to repay it. (q)

If after an order that a party shall pay costs to a petitioner, the petitioner, in consideration of certain actions against him being withdrawn, and of his name being erased from certain bills of exchange, execute to the party a release of the costs named in the order, after notice given to the party not to pay the costs to the petitioner but to his attorney, the release will not protect him from payment of costs to such attorney. (r)

(n) *Read v. Dupper*, 6 T. R. 361. (App. 36.)

(o) *Welsh v. Hole*, Doug. 236, in *Swain v. Senet*, 2 N. R. 101, Sir J. Mansfield, speaking of *Welsh v. Hole*, says, "I do not collect from the cases stated that any positive rule has been laid down which obliges us to hold that the plaintiff's attorney may be cheated of his costs, unless he has given notice to the defendant or his attorney not to pay them over. The case which is strongest in favor of this application rather appears to me to imply the contrary. Lord Mansfield there seems to think that ten guineas might be a reasonable compensation for a man who has lain two years in goal, which the defendant in that case had done."

(p) *Swain v. Senet*, 2 N. R. 99.

(q) *Omerod v. Tate*, 1 East, 464. (App. 43.)

(r) *Ex parte Bryant*, 2 Rose, 237. 1 Maddock, 49.



**WAIVER OF LIEN BY AN ATTORNEY.**

If an attorney decline to proceed for his client, he has not a lien upon any sum in court in the suit wherein he acted as attorney. (*s*)

It has been said that an attorney has not a general lien upon any writings which are delivered to him on a special trust. (*t*)

If the deeds are delivered to a solicitor to raise money or prepare a mortgage, and the object having failed, they are permitted to remain in his hands, he has a lien upon them for his general balance. (*u*)

If an attorney take promissory notes payable three years after date for his bill, it has been decided that the client may, before the notes are due, insist upon a delivery to him by the attorney of the different papers upon which, previous to taking the notes, he had a lien. (*x*)

If a client accept five bills of exchange at different dates, drawn by his attorney for the amount of his bill of costs, of which bills some have been refused payment, and an execution afterwards issue against the client at the suit of one of his creditors, and the client give to his attorney a sum to discharge the debt, and upon payment of such sum to the creditor, the creditor deliver to the attorney a lease which had been deposited by the client with the creditor as a collateral security for the debt, the attorney has a lien upon the lease. (*y*)

If a solicitor who has papers in his hands relating to a

(*s*) *Creswell v. Byron*, 14. Ves. 271. (App. 119.)

(*t*) *Lawson v. Dickenson*, 8. Mod. 307. (App. 6.) See ante, 42, (*q*) and (*r*).

(*u*) *Ex parte Pemberton*, 1810, 18. Ves. 287. *Ex parte Stirling*, 16. Ves. 259.

(*x*) *Cowell v Simpson*, 1809, 16. Ves. 276. (App. 126.) But see next article, and *Stevenson v. Blakelock*, 1. Maule and Selw. 535.

(*y*) *Stevenson v. Blakelock*, 1. Maule and Selw. 535. (App. 153.) ante, 41 and 56.

bankrupt's estate, obtain an order under the commission to have his bill of costs taxed and to be permitted to prove the amount to be found due upon the taxation, he waives his lien. (z)

If a solicitor who has papers in his hands relating to a bankrupt's estate, upon which he claims a lien, obtain an order to have his bill taxed and to prove the sum found due upon taxation, the assignees until the taxation may inspect the papers. (z)

#### **LIEN OF AGENTS AND CLERKS IN COURT.**

If a client change his solicitor in the country, the agent has a lien for what is due in the cause from the new solicitor and the old solicitor. (b)

A clerk in court has a lien upon papers for any sum due from the client to the solicitor. (c)

A clerk in court has not a lien against the client for money lent to the solicitor to carry on the cause. (d)

A clerk in court has a general lien as well on collateral proceedings as on a decree. (e)

A clerk in court has a lien upon a sum due from the client to the attorney by whom a bill has been delivered including the clerk in court's demand. (f)

(z) *Ex parte Hornby*, 1. Beck, 351.

(b) *Ward v. Hepple*, 15. Ves. 297. (App. 123.)

(c) *Tanwell v. Coker*, 2. P. Wms. 460.

(d) *Gray v. Cockeril*, 2. Atk. 113. (App. 8.)

(e) *Anonymous*, 2. Ves. Sen. 25.

(f) *Waldron's Case*, 2. Strange, 1126. *Rex v. Smollet*, 3. Burr. 1313. See *Ward v. Hepple*, 15. Ves. 297. (App. 123.)

## CHAPTER IV.

LIEN AGAINST THE PROPRIETOR WHEN THE CLAIMANT HAS  
OBTAINED THE GOODS NOT FROM THE PROPRIETOR.

The cases on this subject may be thus exhibited :

- |   |                   |   |   |
|---|-------------------|---|---|
| { | 1. In general.    | { | 1. When the claim is not for a general balance. |
|   |                   | { | 2. When the claim is for a general balance.     |
|   | 2. In bankruptcy. |   |   |

## WHERE THE CLAIM IS NOT FOR A GENERAL BALANCE.

Liens may be derived through the acts of servants or agents, acting within the scope of their employment. (g)

It has been ruled that if a servant break his master's carriage, and, without the knowledge of the master, take it to a coachmaker's who has never been employed by the master as his coachmaker, and the coachmaker repair it, he has not any lien upon the carriage against the master. (h)

Although the traveller has stolen the horse, the inn-keeper has a lien against the right owner. (i)

Upon a consignment of property which comes into the possession of the consignee after the death of the consignor, it seems that the consignee has the same lien against the executors of the consignor which he had against the consignor; but it is clear that the consignee

(g) D. Lord Ellenborough, *Hussey v. Christie*, 9. East, 433. (App. 120.)

(h) *Hiscox v. Greenwood*, 4. Esp. 174.

(i) *Yorke v. Grennagh*, Lord Raym. 866. (App. 4.) See ante, page 24; note (c).

has such lien if the executors confirm the acts of the consignor. (*k*)

It has been decided that a factor has not a lien upon goods intrusted to him by his principal against the executor of his principal. (*l*)

A tenant for life cannot give a lien against the remainder man. (*m*)

Whether an attorney has a lien upon papers, the property of third persons, has been doubted. (*r*)

The solicitor of a plaintiff who dies has a lien out of the sum decreed in preference to bond creditors. (*s*)

It has been ruled, that if the consignee of sugars place them with a broker who, without notice of the principal, makes advances, and accepts bills on the credit of the sugar, he has a lien upon them against the consignor for the amount of the sum and acceptances. (*t*)

If a broker buy goods in his own name for his principal, and afterwards tortiously pledge them as his own, for a loan of money, the creditor has not, as against the principal, any lien upon the goods. (*u*)

If goods be imported and landed at a wharf, and, by the custom of trade, the wharfage is paid by the importer at the Christmas following the importation, whether the goods be removed or not; and the goods are sold, and an

(*k*) *Hammonds v. Barclay*, 2. East, 227. (App. 46.) It has been decided that a factor has not a lien upon cloths against the executor of his principal. *Chapman v. Derby*, 1689, 2. Vern. 117. (App. 3.) Sed Q. It seems that the representative of a person deceased has the same lien which the testator had. *Bolton v. Tate*, 1818, 1. Swanston, 84.

(*l*) *Chapman v. Derby*, 2. Vern. 117. (App. 3.) Sed. Q. See *Hammonds v. Barclay*, 2. East, 227. *Bolton v. Tate*, 1. Swan. 84.

(*m*) *Hoare v. Parker*, 2. Term Rep. 378. Ex parte Nesbitt, 2. Sch. 279, ante, 56.

(*r*) See Bac. Abr. Title. Attorney. (*f*) ante, page 55.

(*s*) *Turwin v. Gibson*, 3. Atk. 720. ante, page 55.

(*t*) *Pultney v. Keymer*, E. 40. G. III. 3. Esp. 182.

(*u*) *McComb v. Davies*, 6. East, 538. 7. East, 5. (App. 160.)

order of delivery given to the vendee, to whom part of the goods are at different times delivered, and the time for payment of the wharfage elapse, the wharfinger has not any lien upon the remainder of the goods against the vendee. (a)

It has been said that a lien is a personal right, and cannot be transferred to another. (b)

If a carpenter, who has parted with his lien on a ship, be paid his demand by the captain, who continues in possession, the captain cannot derive any lien as standing in the place of the carpenter. (c)

If a lien be derived from an agent acting within the scope of his authority, and the agent pay the creditor entitled to the lien, it does not follow that the agent has the lien. (d)

If a servant pay a tailor who has a lien on clothes, the servant has not a lien. (d)

**WHERE THE CLAIM IS FOR A GENERAL BALANCE.**

It has been said that general liens are not to affect the rights of third persons not claiming under those from whom the right to the lien is derived. (x)

A carrier has not a lien against the consignee for a general balance due from the consignor. (y)

Upon an agreement for a general balance between a carrier and a consignor, the carrier has not any lien against the consignee for a general balance due from the consignor. (y)

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(a) *Crawshay v. Homfray*, Nov. 1820, 4, Barn. and Ald. 50.

(b) *Daubigny v. Duval*, 5. Term Rep. 605.

(c) *Wilkins v. Carmichael*, Doug. 97.

(d) D. Lord Ellenborough in *Hussey v. Christie*, 9. East. 433.

(x) *D. Rooke, J. Richardson v. Goss*, 3. Bos. and Pull. 419.

(y) *Butler v. Woolcott*, 2. New Series, 64. (App. 88.)

If a contract of sale of goods on credit be rescinded whilst the goods are in transitu, and the goods, before they can be stopped by the vendor, are afterwards delivered at a wharf for the use of the vendee, and the wharfinger has not (z) advanced any money, or accepted any bill upon the credit of the goods, he is entitled against the vendor to a lien only for the carriage of the goods. (a)

An agreement between a carrier and a consignee for a lien for his general balance, will not entitle the carrier to a lien for his general balance due from the consignee upon the goods being stopped in transitu by the consignor. (c)

If the proprietor of a lease agree to sell it to be paid by bills of exchange at different dates, and that the lease shall remain in the hands of an attorney as a collateral security for the payment of the bills, and the proprietor of this lease afterwards obtain it from the attorney, and pledge it with his bankers, to whom with other securities he also gives the bills of exchange, the bankers have not against the purchaser, a lien upon the lease for more than the amount of the bills. (d)

If a trader abroad consign goods to his factor in England to be sold by such factor for the benefit and on account of the principal, who is a creditor of the factors, and the goods are by the bill of lading to be delivered to the factor or his assigns; and the factor indorse the bill of lading, and deliver it together with the goods to a broker to whom the factor is indebted; and the broker ad-

(z) See Lord Alvanley's judgment in *Richardson v. Goss*, 3. Bos. and Pull. 126, and *postea* under property in transitu: where the consignee has aliened the goods before their arrival.

(a) *Richardson v. Goss*, 3. Bos. and Pull. 126. (App. 67.)

(c) *Oppenheim v. Russell*, 3. Bos. and Pull. 42. (App. 54.)

(d) *Hooper v. Ramsbottom*, 4. Camp. 121. (App. 139.)

vance a further sum of money to the factor upon the credit of those goods, and the broker has no knowledge that the factor was not the owner of the goods, and the goods remain unsold in the possession of the broker, and the factor is indebted to the principal, the broker has not any lien upon the goods against the principal. (e)

It has been said that cases may exist where a principal would be bound by a pledge made by his factor. (f)

If a creditor has a lien upon a cargo, a creditor of the principal's cannot attach it or the produce of it, without discharging the lien. (g)

If a foreign merchant direct his correspondent in England to effect an insurance on a cargo, and the correspondent in pursuance of such directions, order his broker to insure, and a loss happen, the broker has the same lien against the merchant which the correspondent has. (h)

If a factor pledge the goods of his principal, the principal may recover the value of them in trover from the pawnee upon tendering to the factor what is due to him on account of those goods without any tender to the

(e) *Martini v. Coles*, 1. Maule and Selw. 140.

(f) In *Martini v. Coles*, 1. Maule and Selw. 140. Lord Ellenborough, C. J. says, "The defendants, having authority to sell the goods, if they had advanced money for any purposes connected with the sale, and for which brokers in the ordinary course of disposing of goods are accustomed to advance it, would have had a lien in respect of such advance."—Le Blanc, J. "If, indeed, advances were made merely to take up the bill of the consignor, and were appropriated to that purpose, there would be no mischief; and that might be considered in furtherance of the authority given by the principal: but if a party make advances to a factor without inquiring for what purpose they are made, he must be contented to rest on the authority with which it shall appear that the factor is clothed."—Bayley, J. "Cases may perhaps exist where a principal would be bound by the pledge made by his factor; but, supposing one of those cases to be where money has been advanced in payment of a bill drawn by the principal for part of the price of the goods: it is not so found here; on the contrary, the claim is in respect of general advances: and if it had been so found, I do not say that it would have made any difference."

(g) *Nathan v. Giles*, 5. Taunt. 558.

(h) *Man v. Shiffner*, 2. East, 524. (App. 51.)

pawnee, although the amount tendered to the factor is less than the debt due from the principal to the factor, and less than the sum due from the factor to the pawnee. (i)

If a merchant direct his broker to effect an insurance, who privately employs another broker, by whom the insurance is effected, and such sub-broker has notice that the insurance is effected for the merchant, and the merchant is indebted to the broker to a greater amount than the broker is indebted to the sub-broker, it has been ruled that such sub-broker has not against the merchant a lien for a general balance due to him from the broker. (k)

If a broker intending to give a security to a creditor to the extent of his lien against his principal, deliver the goods to the creditor, with notice of the lien, it seems that such creditor has, as against the principal, the same lien which the broker had. (l)

If an agent effect an insurance for his principal, and the policy-broker know that it is for the principal, the

(i) *Daubigny v. Duval*, 5. Term Rep. 605. On the trial the case was reduced to this point; whether or not the principals should have tendered to the pawnee the money advanced by them? Lord Kenyon was of opinion that they ought, it being within the money due from the plaintiffs as principals to their factor *Devallen*; and the plaintiffs were nonsuited. Upon the motion for a new trial, which was granted, Lord Kenyon, C. J. "As this is a case of great importance, and as my brothers are of an opinion that a new trial should be granted, I shall not resist it, though I have considerable doubts in my mind upon the question. The rule on which I proceeded at the trial was this, that the principal was not bound to tender a larger sum to the pawnee than was due from himself to the factor." In *M'Combie v. Davies*, 7. East, Lord Ellenborough says, "In *Daubigny v. Duval*, though Lord Kenyon was at first of opinion that there ought to have been a tender to the pawnee of the sum for which the goods had been pledged by the factor, within the extent of his lien in order to entitle the plaintiff to recover; yet after the rest of the court had expressed a different opinion, on which he at that time only stated his doubts, he appears in the subsequent case of *Sweet and another, assignees of Gard, v. Pym*, to have fully acceded to their opinion; for he there states, "that the right of lien has never been carried further than while the goods continue in the possession of the party claiming it."

(k) *Snook v. Davidson*, 2. Camp. 218. (App. 130.)

(l) *M'Combie v. Davies*, 7. East, 5. (App. 160.)



broker has not any lien against the principal upon the policy for a general balance due to him from the agent. (m)

If an agent, without naming his principal, effect the insurance in his own name, but warrant the property neutral, the broker has such notice that the insurance is not on account of the agent, as to deprive him, upon the bankruptcy of the agent, of any lien for a general balance due from such agent. (m)

If a merchant inclose an unindorsed bill of lading of goods deliverable to the shipper's order, and direct him to effect an insurance upon it, and the shipper represent to a broker that he has authority to indorse the bill of lading, which he does indorse, and the broker effect an insurance, by the direction of the shipper, it has been ruled that the broker has not, against the merchant, a lien for a general balance due from the shipper. (n)

(m) *Maans v. Henderson*, 1. East, 335. (App. 41.) *Man v. Shiffner*, 2. East, 523. (App. 51.)

(n) *Lanyon v. Blanchard*, 2. Camp. 598. (App. 131.) I arrange it in this place, because the representation by the shipper, that he had authority to indorse the bill of lading, seems to imply that the insurance was not effected by the shipper on his own account. The words reported to have been used by Lord Ellenborough are, "That in transactions of this sort, if an agent represents himself to have a power which is not intrusted to him, his principal is not bound by his acts; that the person who gives faith to the representations of the agent must run the risk of their being true or false; and that as Crowgy had no authority to indorse the bill of lading, or to act as proprietor of the tallow, the defendant was only a sub-agent, and could not retain the sum he had received upon the policy from the person, for whose ultimate benefit it was effected."—Verdict for the amount of the loss, subject to a deduction for the premiums and other charges due on this particular policy. But see *Westwood v. Bell*. 4. Camp. 352; where Gibbs, C. J. says, "I hold that if a policy of insurance is effected by a broker, in ignorance that it does not belong to the persons by whom he is employed, he has a lien upon it for the amount of the balance which they owe him. In this case Clarkson has misconducted himself, and is liable for not disclosing that he was a mere agent in the transaction; but the defendants, who had every reason to believe that he was the principal, are entitled to hold the policy."

If an agent effect an insurance for his principal, and the policy-broker do not know that it is for the principal, the broker has against the principal a lien upon the policy for a general balance due from the agent. (o)

The party who seeks to deprive a broker of his general lien, because he knew that the policy was not effected on account of his employer, must prove it. (p)

It has been ruled that a calico-printer, to whom the goods of a third person are delivered by his employer to be printed, has a lien against such third person for the general balance due from the employer, if the calico-printer did not know that the goods did not belong to his employer. (q)

It is said to have been ruled, that if the person who deals with a factor, receives goods from him as his own, he has a right to hold them for a debt due by the factor, and against the rightful owner. (r)

If a grazier in the country deliver beasts to a drover for sale in Smithfield, and the drover deliver them to a salesman, whose book-keeper receives the money from the sale, the book-keeper has not a lien against the grazier for a balance due to him from the salesman. (r)

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(o) Mann v. Forester, 4. Camp. 60.

(p) Westwood v. Bell, 4. Camp. 349. (App. 166.)

(q) Weldon v. Gould, 3. Esp. 268. (App. 40.)

(r) Good v. Jones, Peake, 176.

## LIEN AGAINST ASSIGNEES OF BANKRUPTS.

- |   |   |   |  |
|---|---|---|--|
| { | 1. In general .                               | { | <ol style="list-style-type: none"> <li>1. When the transaction is complete before the bankruptcy.</li> <li>2. When the transaction is wholly after the act of bankruptcy.</li> <li>3. When the transaction is inchoate at the time of the bankruptcy.</li> </ol> |
|   | 2. Judgments, Recognizances, and Attachments. |   |  |

### WHEN THE TRANSACTION IS COMPLETE BEFORE THE BANKRUPTCY.

A creditor who is entitled to a lien has the same lien against the assignees under a commission of bankruptcy against the debtor which he had against the debtor himself.

An attorney has the same lien against the assignees which he had against the bankrupt. (a)

If a trader before his bankruptcy, assign a bond, and deliver possession to the assignee, and notice is given to the obligor, the assignee is entitled to the proceeds of the bond. (b)

If a policy-broker, to whom a bankrupt is indebted before his bankruptcy for premiums, be, at the time of the bankruptcy, in possession of a policy of insurance of the bankrupt's upon which losses have happened: the broker has a lien upon the money which he receives from the underwriters after the bankruptcy. (c)

(a) *Ex parte Bush*, 7. Vin. 74. (App. 8.) *Ex parte Bell*, Aug. 1803, Cooke, 442.

(b) *Winch v. Keeley*, 1. Term Rep. 619. See *Row v. Dawson*, 1. Ves. 331. See *Peters v. Soam*, 2. Vern. 428. See *Ex parte Menro*, 1. Buck, 300.

(c) *Whitehead v. Vaughan*, Cooke, 579. (App. 20.) *Parker v. Carter*, Cooke, 602. (App. 20.) Note.—It does not appear in this case whether the loss happened before or after the bankruptcy.

If, before the bankruptcy of the principal, a factor part with the actual possession of the goods of his principal to a purchaser of them, against whom he may maintain an action for the value of the purchase-money, or to whom, upon payment, he may give a discharge, the vendee will be authorised in paying, after the bankruptcy of the principal, the purchase-money to the factor, who will then have a lien upon the money. (*d*)

If a trader give to his creditor a draft upon a person in a public office, ordering him, "out of the money due to the trader, and money that will become due, to pay the creditor for value received," and the creditor deposit this draft with the officer, the creditor upon the bankruptcy of the trader, has a lien upon the money due from the office to the trader. (*e*)

WHEN THE TRANSACTION IS WHOLLY AFTER THE ACT OF  
BANKRUPTCY.

A trader cannot give a lien on particular goods after he is a bankrupt. (*f*)

An attorney has not any lien on papers received by him after the bankruptcy of his client. (*g*)

If a trader commit an act of bankruptcy by lying two months in prison, his attorney cannot gain any lien upon papers intrusted to him by the trader after the time of his first arrest. (*h*)

(*d*) *Drinkwater v. Goodwin*, Cowp. 251. (App. 18.)

(*e*) *Row v. Dawson*, 1. Ves. 331.

(*f*) *Buckley v. Taylor*, 2. Term Rep. 600. See the following notes, and *D. Bul-ler, J. Vernon v. Hankey*, 2. Term Rep, 113. See particularly *Copland v. Stein*, 8. Term Rep. 199. *Walker v. Balfour*, 2. Camp. 579.

(*g*) *Ex parte Bush*, 7. Vin. 74. (App. 8.) *Ex parte Lee*, 2. Ves. Jun. 285. *Parker v. Carter, Cooke*, 602.

(*h*) *Ex parte Lee*, 2. Ves. Jun. 285. (App. 27.)

**WHEN THE TRANSACTION IS INCHOATE AT THE TIME  
OF THE BANKRUPTCY.**

If a trader, after having recovered judgment become a bankrupt: and a docket be struck before the money levied is paid: the trader's attorney, upon giving notice to the sheriff, is entitled to his costs. (i)

If a trader write to his factor, saying that he shall consign goods to him, upon the credit of which the factor accept bills drawn by the trader; and the trader ship the goods in his own name, without any direction to whom they are to be delivered, and he commit an act of bankruptcy, and afterwards sign an order for delivering the goods to the factor, it is not such a possession as will entitle the factor to a lien upon the goods. (k)

If money be advanced to a bankrupt, before his bankruptcy, upon the collateral security of a policy of insurance and letters of advice, together with an undertaking by the bankrupt to deliver the property which is at sea, and to indorse the bill of lading immediately upon its arrival: and the bill of lading be indorsed as soon as it arrives, although after the bankruptcy, and the creditor obtain possession of the goods upon their arrival, he has a lien upon them. (l)

If a creditor having an equitable mortgage by a deposit of a lease and a warrant of attorney, enter up judgment and issue execution, and the debtor apply to a third person to pay off the mortgage debt, which he agrees to do upon the security of a warrant of attorney and a deposit of the lease, and he accordingly accompany the debtor

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(i) *Griffin v. Eyles*, 1789, 1. H. Bl. 192.

(k) *Nichols v. Clent*, 3. Price, 547.

(l) *Lempriere v. Pasley*, 2. Term Rep. 485.

to the original execution creditor, and pay the debt and costs, and receive the lease, and the debtor on the same day execute a warrant of attorney, with a defeazance reciting that such third person has lent him the money, and that he had deposited with the lender the lease as a security for the payment: and such payment and deposit of the lease is after an act of bankruptcy; the equitable mortgage is void under a commission which afterwards issues. (m)

If a creditor, having two leases and some plate deposited with him as a security, issue an execution against the goods of his debtor, and such creditor relinquish his execution upon receiving security from another person to whom the execution creditor deliver the leases and plate: and the debtor afterwards assign all his property to such person to indemnify him against his liability and to discharge a debt due to him, and this assignment is an act of bankruptcy; such person has a lien upon the lease and plate. (n)

If three persons execute a joint warrant of attorney upon which judgment is entered against the three, and a *feri facias* is issued against only one of the defendants reciting a judgment against him alone, under which his goods are taken and sold, but before the sale he become bankrupt, the court will not permit the plaintiff to amend the writ of *feri facias*, by making it conformable to the judgment, to the prejudice of the assignees. (o)

The court is unwilling to interfere with the rights of parties which have accrued by bankruptcy. (o)

(m) *Ex parte Coomb*, 1810, 1. Rose, 369. 17. Ves. 370; but note Mr. Vesey has omitted to state the material fact that the deposit was after the act of bankruptcy.

(n) *Ex parte Smith*, 1813, 1. Beames, 518.

(o) *Hunt v. Pasmore*, 4. Maule, 329.

If the foreign agent of a bankrupt dispose abroad of goods which belonged to the bankrupt, and upon which a creditor had at the time of his bankruptcy a lien, such agent cannot protect the creditor's lien by substituting after the bankruptcy other goods of the bankrupt's in lieu of the goods of which he has so disposed. (q)

If a trader, to whom application is made for payment of 47l., say that he has a bill of 100l. in his possession, and will pay him if he will procure the bill to be discounted, and the creditor require time to make inquiries as to the responsibility of the parties to the bill, and pending the inquiries the trader become a bankrupt, and the jury find that the creditor was not, by the agreement, to retain the bill till the debt was satisfied, the assignees are entitled to the bill. (r)

If a creditor, previous to an act of bankruptcy committed by his debtor, have goods deposited with him as a security for his debt until further orders, and if, after an act of bankruptcy committed by his debtor, he pay the amount of his debt, and the creditor advances a further sum without any notice of the pledge, the creditor has not, by virtue of the deposit, any lien for the further advance; and if a commission issue against the debtor the assignees may maintain trover for the goods. (s)

If a trader, on the eve of his bankruptcy, assign the legal title to the person who has the equitable title, the assignment is valid. (t)

A paper respecting an equitable lien, signed after the act of bankruptcy, if inconsistent with a parol agreement

(q) *Meyer v. Sharpe*, 1813, 4. Taunt. 76. *Hutton v. Bragg*, 2. Marshall, 345. (App. 171.)

(r) *Humphries v. Wilson*, 2. Starkie, 566.

(s) *Birdwood v. Raphael*, 5. Price, 594.

(t) *Hern v. Mill*, 13. Ves. J. 122.

respecting such lien, is strong presumptive evidence against the claim: if consistent, it ought not to operate prejudicially or beneficially. (u)

#### JUDGMENTS, RECOGNIZANCES, AND ATTACHMENTS.

If a creditor have a security for his debt by judgment, statute, (a) recognizance, specialty, or other security, or if by special custom he have made an attachment (b) on the bankrupt's goods and chattels, whereof there is no execution or extent served and executed upon any of the real or personal estate of the bankrupt, before the time he becomes a bankrupt, such security is no lien upon the bankrupt's property. (c)

If a person be bound in a recognizance upon which, being forfeited, an extent issued, and the goods extended and the writ and inquisition returned, the creditor has a lien upon the goods, although the debtor becomes a bankrupt, after the return of the inquisition, and before the issuing of the liberate. (d)

A teste (e) or delivery (f) before the bankruptcy of a debtor of a writ of *feri facias* to the sheriff is not a sufficient service and execution to raise a lien: but a seizure (g) by the sheriff, upon a writ of *feri facias* before the bankruptcy of the debtor, is a valid service and execution, and gives the creditor a lien on the goods.

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(u) *Ex parte Langston*, 1. Rose, 26.

(a) *Newland v. ———* 1. P. Wms. 92.

(b) *Mackintosh v. Ogilvie*, 4. Ter. Rep. 193. *Phillips v. Hunter*, 2. H. Bl. 402.

(c) 21. Jac. I. c. 19. s. 9. *Barker v. Goodair*, 11. Ves. 78.

(d) *Andley v. Halsey*, A. D. 1618, Cro. Car. 148.

(e) *Bayley v. Bunning*, A. D. 1662, 1. Lev. 173.

(f) *Phillips v. Thompson*, A. D. 1683, 3. Lev. 69 and 191. *Smallcomb v. Cress*, A. D. 1697, 1. Lord Raym. 251.

(g) *Cole v. Davies*, A. D. 1698, 1. Lord Raym. 724. See *Sloper v. Fish*, 2. Ves. and Beames, 146.



It has been ruled *at nisi prius*, that an execution of the writ, by delivering the warrant to a shopman of the trader's in a county where there are not any bound bailiffs, is not a sufficient execution to protect the property from being distributable under a commission. (h)

A judgment, whereof there is no execution or extent served and executed, is no lien either upon the real or upon the personal estate of the bankrupt. (i)

If a trader, seised of land in fee, after confessing a judgment to a creditor, sell the land to another person, and the purchaser pay part of the purchase-money, is let into possession, and is to pay the residue upon having a good title, and the trader then become a bankrupt, the judgment creditor has not any lien upon the residue which is unpaid. (i)

Assignees may make a good title notwithstanding there are judgment creditors before the bankruptcy, if execution has not been executed. (k)

It seems that if judgment was entered before the bankrupt was a trader, it binds the lands, notwithstanding the bankruptcy; although execution is not issued. (l)

If a trader be appointed guardian to an infant, and enter into recognizance with two sureties to account for the property, the sureties cannot, upon the bankruptcy of the trader, pray that part of his estate may be sold to satisfy a debt due from the bankrupt to the minor's estate and secured by the recognizance. (m)

(h) Jackson v. Irving, 2. Camp. 48.

(i) Orlebar v. Fletcher, A. D. 1721, 1. P. Wms. 738.

(k) Sharp v. Roahde, 2. Rose, 192.

(l) D. Lord Redesdale, in re Warren, 2. Schoales, 425.

(m) Ex parte Usher, 1. Ball and B. 197.

## Book II.

### Equitable Lien.

**T**HERE are liens which exist only in equity. (a)

There is not any difference between the rules of decisions in courts of law and in courts of equity, respecting liens on the goods of one man in the possession of another. (b)

A court of equity will relieve in a case when there is a lien at law, if, from the difficulty attendant upon it, the parties are unable to obtain justice at law. (c)

Equitable liens are: { 1. Between vendor and vendee.  
2. Upon a deposit of deeds.

(a) Gladstone v. Birley, 2. Merivale, 404. (App. 177.)

(b) Birley v. Gladstone, 3. Maule and Selw. 206. (App. 158.) In this case at law, 3. Maule and Selw. 217, Lord Ellenborough says, "I do not say that a court of equity might not afford a remedy to the party under this clause, though there does not seem to be any instance of its having so done."

(c) Weymouth v. Boyer, 1. Ves. J. 416.

## CHAPTER I.

**Equitable Lien of Vendor and Vendee.**

## § 1.

**LIEN OF VENDOR.**

The vendor of an estate has a lien upon it for any part of the purchase money which is unpaid against all persons, except a purchaser for a valuable consideration without notice. (*f*)

The vendor's lien exists without any agreement. (*g*)

The vendor's lien exists, whether the estate is or is not conveyed. (*h*)

If the purchaser is dead, the vendor has a lien against the heir. (*i*)

(*f*) The cases in order of time upon this subject are annexed. *Hearne v. Botchers*, Cary's Ch. Rep. 25. *Chapman v. Tanner*, 1684, 1. Vern. 267. See observations upon this case in *Mackreth v. Symmons*, 15. Ves. 329. *Bond v. Kent*, 1692, 2. Vernon, 281. *Fawell v. Heelis*, 1723, Ambler, 724. *Gibbons v. Beddall*, 2. Eq. Ca. Abr. 682, cited in *Mackreth v. Symmons*. *Coppin v. Coppin*, 1725, 2. P. Wms. 291. *Lacon v. Mertins*, 1742, 3. Atk. 1. *Pollixfen v. Moore*, 1745, 3. Atk. 272. *Harrison v. Southcote*, 1755, 2. Ves. 369. *Walker v. Preswick*, 1755, 2. Ves. 622. *Burgess v. Wheate*, 1759, 1. Blackstone, 123. *Tardiffe v. Scrughan*, 1769, cit. arg. *Blackburn v. Gregson*, 1. Bro. 422. *Cator v. Pembroke*, 1783, 1. Bro. 303. *Powell v. Brockway*, cited in *Blackburn v. Gregson*, 1. Bro. 422, and in *Mackreth v. Symmons*, 15. Ves. 346. *Blackburn v. Gregson*, 1785, 1. Bro. C. C. 420. *Smith v. Hibbard*, 1789, 2. Dickens, 730. *Bowles v. Rogers*, 1801, cit. arg. *Ex parte Hunter*, 6. Ves. 94. *Ansten v. Halsey*, 1801, 6. Ves. 483. *Nairn v. Prowse*, 1802, 6. Ves. 752. *Elliott v. Edwards*, 1802, 3. Bos. and Pull. 181. *Hughes v. Kearney*, 1803, 1. Sch. and Lef. 135. *Trimmer v. Bayne*, 1803, 9. Ves. 209. *Mackreth v. Symmons*, 1808, 15. Ves. 329.

(*g*) *Chapman v. Tanner*, 1684, 1. Vern. 267.

(*h*) *Smith v. Hibbard*, 2. Dickens, 730.

(*i*) *Cator v. Lord Pembroke*, 1. Bro. 301. *Smith v. Hibbard*, 2. Dick. 730.

The vendor's lien exists against the assignees under a commission of bankruptcy against the purchaser. (*k*)

The vendor has not any lien against a purchaser for a valuable consideration from the vendee without notice. (*l*)

Whether an equitable mortgage by deposit of deeds to a person, *bond fide* and without notice, will divest the vendor's equitable lien has been agitated. (*m*)

An agreement by the vendee to assign his interest, by which only the equitable interest is conveyed, seems not to divest the original vendor of his lien. (*n*)

Whether upon a transfer by the vendee to a creditor in consideration of the debt, such creditor is a purchaser for a valuable consideration, so as to divest the original vendor of his lien has been agitated. (*n*)

A recital in a deed of sale, by a purchaser to a vendee from him, that the title is deduced from another vendor, is not notice to the vendee that the purchase-money was not paid to the original vendor. (*o*)

A Roman Catholic vendor has not a lien upon the land for his purchase-money. (*p*)

#### WAIVER BY VENDOR OF HIS LIEN.

The signature of a receipt for the purchase-money, if in fact it is not paid, is not a waiver of the vendor's lien. (*q*)

It depends upon the circumstances of each case, whe-

(*k*) *Chapman v. Turner*, 1684, 1. Vern. 267. *Fawell v. Heelis*, Amb. 724.

(*l*) *Hughes v. Kearney*, 1803, 1. Sch. and Lef. 132. *Cator v. Pembroke*, 1. Bro. 302.

(*m*) *Nairn v. Prowse*, 6. Ves. 752. See Sugden on Vendors, 406.

(*n*) *Mackreth v. Symmons*, 15. Ves. 340.

(*o*) *Cator v. Lord Pembroke*, 1. Brown, 302.

(*p*) *D. Lord Chancellor*, *Harrison v. Southcote*, 2. Ves. 189.

(*q*) *Fawell v. Heelis*, 1772, Amb. 724. *Coppin v. Coppin*, 1725, 2. P. Wms. 294. *Hughes v. Kearney*, 1803, 1. Sch. and Lef. 132.

ther a vendor by taking a security, waives his lien: and the mode of determining whether he does waive it seems to be by considering if he intended to give credit solely to the person from whom the security was taken. (r)

The presumption is that the lien exists. (s)

The lien exists unless a manifest intention appears that it shall not exist. (t)

If the vendor take security for the purchase-money, it is incumbent on the vendee to shew that it is a waiver of the vendor's lien. (u)

#### WAIVER OF VENDOR'S LIEN BY TAKING BILLS AND NOTES.

The taking bills of exchange by the vendor, drawn upon the vendee, is not a waiver. (x)

If the vendor convey the estate to the purchaser, and the consideration is stated to have been made, but the payment is only by bills of exchange drawn by the purchaser at different dates, and accepted by him and his partner, and the purchaser sell the estate to a vendee with notice, who pays part of the purchase-money, the original vendor has a lien upon the unpaid residue towards the payment of the bills of exchange. (x)

The vendor's lien prevails against the purchaser from the vendee, with notice that the vendor give a promis-

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(r) *D. L. C. Mackreth v. Symmons*, 15. Ves. 350. See *Grant v. Mills*, 2. Ves. and Beames, 206.

(s) *Hughes v. Kearney*, 1. Sch. and Lef. 132. *Mackreth v. Symmons*, 15. Ves. 341. In *Ex parte Loaring*, 2. Rose, 79, Lord Eldon says, "I much wish that this species of lien had never been admitted where the vendor had accepted a different security."

(t) *D. L. C. Mackreth v. Symmons*, 15. Ves. 341.

(u) *Hughes v. Kearney*, 1803, 1. Sch. and Lef. 132.

(x) *Grant v. Mills*, 2. Ves. and Beames, 306.

sory note, which is unpaid, for part of the purchase-money. (y)

If the vendor of an estate take as part of the purchase-money the vendee's note at four months which he discounts and negotiates, and a conveyance is executed, and a receipt is indorsed for the purchase-money, and possession is delivered, and the vendor take up the note, he has a lien upon the estate. (z)

If the vendor take as part of the purchase-money bills drawn on an insolvent house, the acceptance of such bills is not a waiver of the vendor's lien. (a)

If the purchaser give a promissory note to a trustee for the vendor, until the amount of debts affecting the land be ascertained, it is not a waiver of the vendor's lien. (a)

#### WAIVER OF VENDOR'S LIEN BY TAKING A BOND.

The taking a bond does not in itself deprive the vendor of his lien. (b)

If the wife convey an estate to her husband who gives a bond for payment, and the estate descend to the son, the wife has a lien on the estate. (c)

#### WAIVER OF VENDOR'S LIEN BY TAKING A MORTGAGE.

If the purchaser give a mortgage upon part of the estate, and a promissory note for the residue, it has been

(y) *Gibbons v. Baddall*, 2. Eq. Abr. 682, date unknown, cited by Chancellor, *Mackreth v. Symmons*, 15. Ves. 344.

(z) *Ex parte Loaring*, 1814, 2. Rose, 79.

(a) *Hughes v. Kearney*, 1803, 1. Sch. and Lef. 132.

(b) *Hearne v. Boteler*, Cary, 25.

(c) *Powell v. Brockway*, cit. in *Blackburn v. Gregson*, 1. Bro. 422, and by Lord Eldon in *Mackreth v. Symmons*, 15. Ves. 346.

determined that the vendor has not a lien for the amount of the note. (d)

It has been said that if the vendor take a mortgage upon another estate, he waives his lien upon the estate sold. (e)

WAIVER BY VENDOR OF HIS LIEN BY GRANT OF ANNUITY.

If the vendor convey his estate to his two daughters, in

(d) *Bond v. Kent*, 1692, 2. Vern. 281. In *Mackreth v. Symmons*, 15. Ves. 344, Lord Eldon says, "It was urged with considerable, perhaps not conclusive, weight, that the express charge of a part gave a ground for the inference, that a lien for the residue was not intended."

(e) By Master of the Rolls in *Nairn v. Prowse*, 6. Ves. 760. "Suppose a mortgage was made upon another estate of the vendee: will equity at the same time give him what is in effect a mortgage upon the estate he sold: the obvious intention of burthening one estate being, that the other shall remain free and unencumbered? Though in that case the vendor would be a creditor if the mortgage proved deficient, yet he would not be a creditor by lien upon the estate he had conveyed away." But see *Mackreth v. Symmons*, 15. Ves. 348, where Lord Eldon says, "In *Nairn v. Prowse*, the Master of the Rolls having before observed that there may be a security which will have the effect of a waiver, proceeds to express his opinion, that if the security be totally distinct and independent, it will then become a case of substitution for the lien, instead of a credit given on account of the lien; meaning, that not a security, but the nature of the security, may amount to satisfactory evidence, that a lien was not intended to be reserved; and puts the case of a mortgage of another estate, or any other pledge as evidence of an intention that the estate sold shall remain free and unincumbered. It must not, however, be understood, that a mortgage taken is to be considered as a conclusive ground for the inference, that a lien was not intended, as I could put many instances that a mortgage of another estate for the purchase-money would not be decisive evidence of an intention to give up the lien; though in the ordinary case a man has always greater security for his money upon a mortgage, than value for his money upon a purchase; and the question must be, whether under the circumstances of that particular case, attending to the worth of that very mortgage, the inference arises. In the instance of a pledge of stock does it necessarily follow, that the vendor, consulting the convenience of the purchaser by permitting him to have the chance of the benefit, therefore gives up the lien, which he has? Under all the circumstances of that case, the judgment of the Master of the Rolls was satisfied that the conclusion did follow; but the doctrine as to taking a mortgage or a pledge, would be carried too far, if it is understood as applicable to all cases, that a man, taking one pledge, therefore necessarily gives up another, which must, I think, be laid down upon the circumstances of each case, rather than universally."

consideration of an annuity, and they give a bond for the payment of the annuity, and one of the daughters marry and die, the vendor has a lien against the husband for a moiety of the annuity. (*f*)

If a vendor sell to her son, and sign a receipt upon the back of the deed for the consideration-money, which in fact is not paid, but the vendor take two bonds from the purchaser, the one for the payment of a moiety of the purchase-money, the other for the payment of an annuity to the vendor for life, and after her death for the payment of the other moiety, and the purchaser afterwards become insolvent, and convey the estate to trustees for his creditors, it has been decided that the vendor has waived her lien. (*g*)

If the vendor sell an estate for 720*l.*, of which 600*l.* is left in the purchaser's hands as an indemnity against an annuity, and the purchaser covenant with the trustee to pay interest on the 600*l.*; and when the annuity ceases or is discharged, to pay the money to the vendor, and the purchaser is let into possession, and so continues for upwards of twenty years, it is supposed to have been determined that the lien on the land is not waived. (*h*)

(*f*) *Nairn v. Prowse*, 6. Ves. 752.

(*g*) *Fawell v. Heelis*, 1773, Ambler, 726, 1. Dickens, 485, Lord Camden says, "In this case it does not appear that it was the intention of the parties that the vendor should have such a lien, but a receipt taken for the consideration-money, on the back of the deed, and the bond was accepted as a satisfaction for the purchase-money. If the vendor parts with his estate, and takes a security for the consideration-money, there is no reason for a court of equity to assist him against the creditors of the purchaser."

(*h*) *Comer v. Walkley*, Reg. Lib. A. fol. 625. Sugden, 397. This case is cited by Mr. Sugden, page 397, as follows:—"The same point seems to have been decided in *Comer v. Walkley*. A trustee sold an estate for 720*l.*: 600*l.* was left in the purchaser's hands as an indemnity against an annuity; and a deed was entered into between him and the trustee, whereby he covenanted to pay interest on the 600*l.*, and when the annuity should cease or be discharged, to pay the money to the trustee. By several conveyances, &c. the estate became again vested in trustees, upon trust to



If the proprietor of an estate is indebted to a creditor in the sum of 13,500*l.*, for the payment of which he is joined in bonds by a surety; and if, after the lapse of six years, the surety, upon a settlement of accounts with the proprietor, take credit for payment of 3,000*l.* to the creditor, and he undertake to discharge the remaining 10,500*l.*; and if other accounts are afterwards settled between them, upon which a balance of 54,000*l.* is due to the surety, including 10,393*l.*, the value of annuities granted by the proprietor, against which the surety agrees to indemnify the proprietor, in consideration of the proprietor agreeing to pay the amount to the surety; and if a bond for 20,000*l.* is accordingly given, and a mortgage in fee is executed by the proprietor to the surety for the balance of 54,000*l.*; and if the proprietor agree to sell the reversion of the mortgaged estates to the surety for 60,000*l.*, and the estate is conveyed to the surety and his heirs to the use of the proprietor for life, with remainder to the surety in fee; and if the surety do not pay the 13,500*l.* or the annuities, which sums constitute part of

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sell, and they sold the estate to a purchaser, who objected to complete his contract, without the concurrence of the person entitled to the residue of the 600*l.* then unpaid. Two bills were filed, one by the person entitled to the residue of the 600*l.* against the purchaser and others, for payment of it; and the other by the purchaser, who had been in possession twenty-two years for a specific performance, which was accordingly decreed, and his costs in both causes were allowed. The proper accounts of the personal estate were directed to be taken in the first cause; but the question, out of what estates any deficiencies should be made good, was reserved: so that it does not appear that the court held the money to be a lien on the land any further than by giving the purchaser his costs in both causes, which circumstance alone is, however, conceived to be decisive." In *Mackreth v. Symmons*, 15. Ves. 354, the Lord Chancellor says, "Since the judgment was pronounced, I have met with a case which was not cited in the argument, but is referred to in Mr. Sugden's work, which seems to me to be a book of considerable merit, in which this subject is considered with much attention; and he comes to a conclusion different from mine. I looked into the register's book for that case, the name of which I do not recollect; and it does seem to me, that his inference is not the necessary inference arising from the circumstances of that case, as I find it in the register's book."

the consideration of his purchase of the reversion, and if the surety contract to execute a mortgage of the reversion to a creditor in consideration of the debt due to him, and such creditor have not notice of any claim of the proprietors, the proprietor has not a lien against the purchaser from the surety upon the reversion of the estates for payments made or to be made by him in respect of the annuities, but he has a lien for the 13,500*l.* (i)

**WAIVER BY VENDOR OF HIS LIEN IN GENERAL.**

If the vendor convey estates to the vendee, who as a security for the purchase-money, transfers into the name of the vendor so much stock as would produce a certain annual income; and in case the price of stock should not rise within two years, so that the stock transferred might be sold for a fixed sum, then that the vendee would pay such fixed sum on receiving a re-transfer of the stock, it has been determined that the vendor waives his lien. (k)

If the vendor sell, in consideration that the purchaser shall pay off mortgages upon the estate to the amount of nearly a moiety of the purchase-money, and for the residue to be paid by three instalments, for which three bonds are given, it seems that the vendor has a lien for the payment by the vendee. (l)

(i) *Mackreth v. Symmons*, 15. Ves. 343. Heard afterwards before the Lord Chancellor and two Judges; but judgment has not been pronounced, and the case has not been reported.

(k) *Nairn v. Prowse*, 6. Ves. 752. In *Mackreth v. Symmons*, 15. Ves. 348, Lord Eldon, after observing upon this case, says, "In the instance of a pledge of stock, does it necessarily follow, that the vendor, consulting the convenience of the purchaser, by permitting him to have the chance of the benefit, therefore gives up the lien which he has?"

(l) *Blackburn v. Gregson*, 1. Brown, 420. There is not any decision in this case; but it seems to be the opinion of the court: and in *Mackreth v. Symmons*, 15. Ves. 346, Lord Eldon says, "In the argument of *Blackburn v. Gregson*, Lord Kenyon

## EQUITABLE LIEN OF VENDOR IN CASE OF BANKRUPTCY.

A vendor who has an equitable lien may obtain an order for a sale, and to prove for the difference. (*m*)

## MARSHALLING ASSETS.

If the purchase-money due to a vendor is paid out of the personal assets of the testator, a legatee is not, as it seems, entitled to the vendor's equitable lien on the estate. (*p*)

If the purchaser die without having paid the purchase-money, and, after leaving legacies, he appoint the vendor, who is his heir at law, his executor, the legatees, upon deficiency of the personal estate, are not entitled to the vendor's equitable lien on the estate. (*q*)

took the doctrine to be perfectly clear; and it is not possible to state a stronger judicial opinion than Lord Loughborough expressed, that the lien does exist; though it is not a decision."

(*m*) *Ex parte Loaring*, 2. Rose, 89. *Grant v. Mills*, 2. Ves. and Beames, 306. *Bowles v. Rogers*, 2. Cooke, 48. *Ex parte Gwynne*, 12. Ves. 379.

(*p*) *Coppin v. Coppin*, 1725, 2. P. Wms. 295. *Pollexfen v. Moore*, 2. Atk. 272. See Sugden, 404. I say it *seems*, because the cases seem not to have finally determined the rule of equity. They may be thus exhibited:

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| <div style="font-size: 3em; line-height: 1; padding-right: 10px;">{</div> <ol style="list-style-type: none"> <li>1. That the legatee is <i>not</i> entitled.</li> <li>2. Doubtful, <i>Austen v. Halsey</i>, 1801, 6. Ves. 478.</li> <li>3. That the legatee is entitled</li> </ol> | <div style="font-size: 3em; line-height: 1; padding-right: 10px;">}</div> <div style="display: inline-block; vertical-align: middle;"> <i>Coppin v. Coppin</i>, 1725, 2. P. Wms. 295.<br/> <i>Pollexfen v. Moore</i>, 1745, 3. Atk. 272.                 </div> |
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Q. 1. Ought the general rule of marshalling (where a specialty creditor has an *actual* charge on the real estate, of which the heir cannot complain) to be extended against the heir to a case where there is *not any actual* charge against the real estate.  
 —Q. 2. Will not the extension of the vendor's equitable lien so as to give a right to marshal, be charging real estate without writing?

(*q*) *Coppin v. Coppin*, 2. P. Wms. 295. In *Mackreth v. Symmons*, 1803, 15. Ves. 329, Lord Chancellor says, "I have some doubt upon another point: taking the vendor to have the lien, whether the court will, in case of the death of the vendee, marshal the assets, so as to throw the lien upon the purchased estate. It has often been said, and the case of *Coppin v. Coppin* stated as an authority, that the court will not do that. The Lord Chancellor in his judgment takes no notice of that point. In that case the vendor happened to be the heir of the vendee; so that the estate was at

If a purchaser die and leave a legacy to his sister, and devise the purchased estate and all his personal estate to a third person, whom he appoints his executor, and the executor commit a *devastavit* of the personal estate, and die, and the purchased estate descend to his son; and if the vendor exhaust the personal assets, the legatee will be entitled to stand in the place of the vendor, and to come upon the purchased estate in the possession of the son to the extent of the *devastavit*. (r)

home : and it was held, that being also the executor, he was entitled to retain the purchase-money out of the personal assets. The decision requires a good deal of consideration. If the estate had been in a third person, the general doctrine as to a person having two funds to resort to, might be thought to have an immediate application : and the express terms of the decree in *Pollexfen v. Moore* might be found very inconsistent with it.

(r) *Pollexfen v. Moore*, 3. Atk. 272. *Fawell v. Heelis*, 1773, *Ambler*, 724. This case was cited by the counsel for the plaintiff. The counsel for the defendant say " *Pollexfen v. Moore* is not correctly reported. The seller was considered as a creditor, rather than having a lien on the estate ; besides, in that case no security was given." Lord Apsley, C. " *Pollexfen v. Moore*, 3. Atk. 372, very inaccurately reported. J. P. seised in fee, after the death of his mother, of Orchard's farm, agreed to sell for 1200*l*. and delivered possession to Moore ; afterwards P. let the farm, and received the rents ; but by reason that the purchase-money was not paid, he kept the title-deeds. Bill to have the purchase completed, he offered to account for the rents, and to deliver up the deeds. The question in the cause was, how to secure the legatee?" In *Blackburn v. Gregson*, 1784, 1. Bro. 420, Kenyon in arg. says, " *Pollexfen v. Moore* is a lien for the unpaid residue of purchase-money." Mansfield for defendants. *Pollexfen v. Moore* makes Lord Hardwicke speak strange language, and make as strange a decree. Lord Loughborough. " *Pollexfen v. Moore* is not correctly reported in *Atkyns* ; but in substance right : there being in that case purchase-money unpaid." From a note of Lord Hardwicke's, I find he says, " I delivered my opinion that the remainder of the estate purchased was to be liable, by virtue of the equitable lien." In *Austen v. Halsey*, 1801, 6. Ves. 480, Mansfield, arg. says, " That the vendor has such a right is proved by *Chapman v. Tanner* : Lord Hardwicke did the same thing in effect in *Pollexfen v. Moore*, a perplexed case. Romilly and Newbolt for defendant. *Pollexfen v. Moore* is a very complicated case, and difficult to follow : but Lord Hardwicke seems to say that equity subsists only between the vendor and vendee, and does not extend to a third person. The decision does not quite agree with that. Lord C. " *Pollexfen v. Moore* is the only case cited ; but without that authority, I consider, &c." *Nairn v. Prowse*, 1802, 6. Ves. 756. The counsel in arg. say, " In *Pollexfen v. Moore*, Lord Hardwicke says, ' this equity subsists only between vendor and vendee, and no third person can

If a testator leave legacies to his infant children, and then give to trustees all his real and personal property in trust, to convey and assign the same, and all the savings and increase unto his son, upon his attaining twenty-one : and by a codicil the testator states that a proposal has been made to him to buy a real estate, and that, if he die before the purchase is completed, it shall be completed and settled when purchased, to the uses of his will directed concerning his other estates ; and he give his trustees and executors power to apply the personal estate for that purpose : and he afterwards contract to purchase the estate, but die before the purchase is completed, it has been agitated whether the infant legatees, upon a deficiency of the personal estate to pay their legacies, can

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avail himself of it." *Trimmer v. Bayne*, 1803, 9. Ves. 209, counsel for the plaintiff in arg. say, " The question, whether the vendor's lien upon the estate for the purchase-money will extend to a third person, has never been decided. There is no such case, except *Pollexfen v. Moore* ; which, as far as can be understood, is a decision in favor of these plaintiffs ; though the dictum dropped by Lord Hardwicke will be relied on against them. The prevailing principle in that case is, that the heir shall not have the estate discharged from the purchase-money to the disappointment of a legatee." The counsel for the defendant observed, " that there was no decision against the dictum of Lord Hardwicke." *Mackreth v. Symmons*, 1808, 15. Ves. 329, counsel for the defendant say, " As to this defendant, if from the passage appearing in the report of *Pollexfen v. Moore*, it is supposed that the lien cannot be extended to a purchaser from the original vendee, it would be perfectly ineffectual ; but that proposition is contradicted by many authorities." The next case is *Coppin v. Coppin*, where the doctrine of *Pollexfen v. Moore* as to marshalling, was practically, though I doubt whether it ought to have been, admitted. In *Pollexfen v. Moore*, Lord Hardwicke affirms the lien of the vendor upon the estate for the remainder of the purchase-money ; considering the vendee from the time of the agreement a trustee as to the money for the vendor ; but adds, " that this equity will not extend to a third person." If that is to be understood, that this equity would not extend to a third person, who had notice that the money was not paid, Lord Hardwicke's subsequent decisions contradict that : if the meaning is that he would follow the case of *Coppin v. Coppin*, and that if the vendor exhausted the personal assets, the legatee of the purchaser should not come upon the estate, there is great difficulty in applying the principle ; as it would then be in the power of the vendor to administer the assets as he pleases : having a lien upon the real estate, to exhaust the personal assets, and disappoint all the creditors, who, if he had resorted to his lien, would have been satisfied ; and in that respect with reference to the principle the case is anomalous.

avail themselves of the vendor's lien upon the estate contracted to be sold. (s)

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(s) *Austen v. Halsey*, 1801, 6. Ves. 478. The point was not decided as, although the personal estate was deficient, the savings of the rents and profits were enough to supply the deficiency. The following are the observations which were made upon the subject.—*Mansfield and Hall for plaintiff*. “Upon the other question, there is a great difference in marshalling against an estate descended and an estate devised. This is the case of an estate descended. A devise can operate only upon the estates the testator actually has at the date of the will; and in this instance the testator according to the words of the statute, *had not* the land either by a legal or an equitable title. In *Langford v. Pitt* it was decided, that an estate contracted for after the date of the will cannot pass by the will. Then, where one party has a right to resort to two funds, and the other has one only, the court marshalls; making an arrangement, that will provide for the payment of every claimant. The vendor of this estate had a right in equity to resort to the estate sold for the payment of his purchase-money. If any difference arises from taking a security for his money, none was taken in this case. That the vendor has such right is proved by *Chapman v. Tanner*; and even the circumstance of taking a security has been held not to destroy the right. Lord Hardwicke did the same thing in effect in *Pollexfen v. Moore*, a perplexed case; and in *Walker v. Preswick*, the case of a ship, his lordship lays down the same doctrine as to land, which is followed by Lord Loughborough in *Blackburn v. Gregson*; where bonds were taken, and part of the money was paid. At the death of this testator no part of the purchase-money was paid; and no security whatsoever was taken. Unless a republication took place after the contract, the will could not dispose of this estate. Therefore this is a descended estate; and the claim of marshalling is made against the heir. If there is a right to resort to two funds, there is no difference, by what title, whether legal or equitable; and there are cases of legacies charged upon land, which being paid out of the personal estate, gave the common legatees a right upon the real estate,—*Romilly and Newbolt for the son*. “The other, question is the only one of any difficulty. It is said, this is a case of marshalling against an heir, because the contract for the purchase of this estate was made after the will; but can there be a doubt, that the codicil directing his executors to apply his personal estate in that purchase, and to settle the purchased estate upon his heir at law is a disposition to take effect? A testator may direct that a thing may be purchased and given to a legatee: as in all cases, where a legacy is said to be of quantity, and not specific. So he may direct stock to be purchased. This must therefore be considered marshalling against a devisee; and it is settled by many decisions, that there can be no marshalling, as between a legatee and a specific devisee: *Clifton v. Burt*. *Forrester v. Lord Leigh*. Both are equally objects of bounty. This testator has expressly directed his personal estate to be applied in purchasing this real estate, to be settled on his son. I do not know that the doctrine of marshalling has ever been applied against an heir in a case of this kind. There is a material distinction between the common cases of marshalling by the equity of this court and a case of this species: the testator looking forward to his situation as purchaser of this estate,

It has been decided, that if a testator, after making his will, contract by writing not under seal for the purchase of a real estate, and the purchase-money is, after his death, paid out of the money produced by the sale of the testator's real estate, the heir is not entitled to be reimbursed out of the personal estate. (i)

§ 2.

LIEN OF VENDEE.

When money is paid prematurely by the purchaser, he has a lien on the estate for the amount. (n)

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and directing the application between those who are to take. *Pollexfen v. Moore* is a very complicated case, and difficult to follow; but Lord Hardwicke seems to say, that equity subsists only between the vendor and vendee, and does not extend to a third person. The decision does not quite agree with that. The disappointment of a legatee is a case that always happens where there is a disposition of property without ascertaining what it is. It is impossible for the court to go upon such a ground."—Lord Chancellor. "Upon the next question, whether, supposing the legacies are not charged upon the real estate, this purchased estate may by circuity be made answerable to the legacies. *Pollexfen v. Moore* is the only case cited; but without that authority, I consider it clearly settled that the vendor has a lien for the purchase-money, while the estate is in the hands of the vendee; I except the case, where upon the contract evidently that lien by implication was not intended to be reserved. That is in equity very like a charge; and the cases of marshalling seem to have gone this length, that where there is a charge upon an estate descended, a legatee shall stand in the place of the person having that charge, resorting to the personal estate; and I do not think a power to apply the personal estate, which is all that is given by this codicil, amounts to a command, leaving no discretion to the trustees. There is a difficulty here, from the circumstance that the estate purchased has not descended, but is devised; and there is a difference in marshalling as to that. In this instance it is devised to the heir, with many remainders over. It may be found difficult for the legatees, by means of this circuity to find a fund for payment. But I shall give no opinion upon that; for the savings being sufficient, with the bulk of the personal estate, to pay the legacies according to the true meaning of this will, those savings are the fund."—Sugden, 403, says, "It is clear that the inclination of the Chancellor's opinion was in favor of the legatee under the general rule."

(i) *Trimmer v. Bayne*, 9. Ves. 211. See some observations upon this decision in Sugden, page 403.

(n) *Burgess v. Wheate*, 1. Black. 123, cited by Lord Eldon in *Mackreth v. Symmons*, 15. Ves. 145.

**CHAPTER II.****Equitable Lien by Deposit of Deeds.**

If a lease be deposited as security for a debt, the pledgee has an equitable lien upon it, and may prove by parol evidence, the purpose for which it is deposited. (*a*)

An equitable lien upon copyhold may be created by deposit of the copies of court-roll. (*b*)

An equitable lien may be given upon a lease containing a covenant against alienation. (*c*)

Equitable liens seem to be contrary to the clear intention and words of an act of parliament, but are adopted, although not favoured by courts of equity. (*d*)

The questions upon this subject are thus divisible :

1. Delivery of only part of the deeds.
2. Delivery of the deeds to a third person.
3. Delivery of the deeds for a particular purpose.
4. As to the lien extending to future debts.

(*a*) *Russel v. Russel*, 1. Bro. 269. *Featherstone v. Fenwick and Harford v. Carpenter*, *ibid.* Ex parte *Coming*, 9. Ves. 115. Ex parte *Wetherall*, 11. Ves. 398. Ex parte *Haigh*, 11. Ves. 403. Ex parte *Finden*, 11. Ves. 404. *Norris v. Wilkinson*, 12. Ves. 192. *Hearn v. Mill*, 13. Ves. 114. Ex parte *Mountfort*, 14. Ves. 606. Ex parte *Warner*, 1. Rose, 286. Ex parte *Langston*, 17. Ves. 200.

(*b*) Ex parte *Warner*, 1. Rose, 286.

(*c*) Ex parte *Baglehole*, 1. Rose, 432. *Doe v. Bevan*, 3. Maule and Selw. 353.

(*d*) See *Russell v. Russell*, 1783, 1. Bro. 269, *Featherstone v. Fenwick*, May, 1784, *Harford v. Carpenter*, April 18, 1785. Ex parte *Haigh*, 1805, 11. Ves. 403. Ex parte *Finden*, 11. Ves. 404. *Morris v. Wilkinson*, 12. Ves. 196. Ex parte *Mountfort*, 1808, 14. Ves. 66. Ex parte *Coombe*, 1809, 17. Ves. 370. Ex parte *Whitbread*, 1812, 1. Rose, 298. Ex parte *Warner*, 1812, 1. Rose, 286. Ex parte *Hooper*, 1. Merivale, 7, 2. Rose, 239.



## DELIVERY OF ONLY PART OF THE DEEDS.

If by indenture, a firm agree to give to their bankers further security for a sum due and for further advances, and covenant that certain premises, mentioned in the schedule, shall be a security accordingly; and some securities belonging to the firm are assigned; and upon the balance being increased, the bankers apply for further security, and the firm agree to deposit the title-deeds of an estate which is specified, and a bundle of papers is sent to the bankers, and represented to be the title-deeds of that estate, which the bankers accept without examining them; and one of the bankers in conversation express his wish to have a regular mortgage of the estate, stating that the title-deeds are in his hands, to which one of the debtors consents; and the other, upon communication to him, say "it is unreasonable, that there is security enough;" and there is a memorandum, written by one of the debtors, entitled "a schedule of the annual value of the property of the debtors, given in security," in which the estate in question is the first article; and, after the bankruptcy of the debtors, it is discovered that the deeds, deposited as the title-deeds of the whole estate, relate only to a moiety of the estate, and bring the title down only to a distant period, and that the bankrupts retained the other deeds, which are in the possession of the assignees, the creditors are entitled to a security upon the whole estate. (*f*)

It has never yet been settled how far it is necessary to deliver all the title-deeds, or whether that would not be

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(*f*) *Ex parte Wetherell*, 11. Ves. J. 403. This is decided upon the ground, that under all the circumstances of the case, there was sufficient evidence in writing to raise the equitable mortgage. See *Hales v. Vanderchem*, 2. Vern. 167.

taken to be a sufficient deposit, which could be taken, upon looking at the instruments, to amount to evidence that the estate was a security. (g)

If a debtor agree to secure the payment of his debt by a mortgage, and all the title-deeds are sent to the creditor who is an attorney, to enable him to prepare the mortgage except the immediate conveyance to the trader in fee; and if the trader, being indebted to another person, deposit with him such immediate conveyance as a security, and promise to send him the title deeds, the creditors cannot, upon the bankruptcy of the trader, unite so as to make a good title. (h)

It is said to have been ruled that in an action of *indebitatus assumpsit* a court of law will consider a deposit of title-deeds to create a lien. (i)

#### **DELIVERY OF DEEDS TO A THIRD PERSON FOR THE CREDITOR.**

If a person lend a sum of money, upon condition that the borrower shall make a security by way of mortgage, to replace the stock within twelve months, and to pay the dividends in the mean time; and in pursuance of this agreement, the borrower deposit title-deeds with his wife, who places them in a trunk, of which she keeps the key, until her husband become bankrupt, the creditor has not any lien. (k)

It seems that such lien may be raised by a deposit in

(g) See note (f), page 91.

(h) *Ex parte Pearce*, in the matter of *Price*, 7. Buck, 525.

(i) *Richards v. Borrett*, 1800, 3. Espinasse, 102. (App. 39.) where Lord Kenyon said, it had been held in equity, that depositing all, or even part of the deeds respecting real property, implied an intention of charging the real estates, and gave the party a lien upon them; and that as this was an equitable action, he would hold the same doctrine."

(k) *Ex parte Coming*, 9. Ves. J. 115.

the hands of a person, who can fairly be called a third person, abstracted from both. (g)

It has been doubted whether a mere memorandum, kept in the possession of the person who made it, and not parted with to the creditor in whose favor it is expressed, will take it out of the statute. (g)

The doctrine of equitable lien is not to be extended to advances made to a person with whom the lease is not deposited, where the person with whom it is deposited is himself a creditor. (h)

If two persons advance separate sums upon a lease, which is deposited with him who advances the largest sum, and the debtor become bankrupt, the creditor for the smaller sum has not a lien. (h)

If an application be made to an equitable mortgagee by a deposit of a deed for a further loan to enable him to procure from the lessor an extension of the term of the lease, upon a parol promise that such lease when granted shall be deposited with the equitable mortgagee for the sum advanced; and that, when the lease is executed, it shall be delivered by the solicitor of the lessor to the equitable mortgagee; and the lease is executed, and remains in the hands of the lessor's solicitor, the equitable mortgagee has not a lien upon it. (i)

#### DELIVERY OF DEEDS FOR A PARTICULAR PURPOSE.

An equitable mortgage is created by the delivery of deeds to prepare a legal mortgage. (k)

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(g) *Ex parte Coming*, 9. Ves. J. 115.

(h) *Ex parte Whitbread*, 1. Rose, 299. In this case the Chancellor says, "I believe Temple to be morally entitled to this interest; but how can I extend a doctrine opening to so much uncertainty? However hard it may be in an individual case, it is better upon principles of public utility to say, that those who wish to render such securities valid, have only to requize a short memorandum in writing."

(i) *Ex parte Coomb*, 4. Mad. 250.

(k) *Ex parte Bruce*, 1. Rose, 374.

If a debtor undertake to execute a mortgage, when a mortgage is duly prepared, and deeds are delivered as a step towards its preparation, the person to whom the deeds are delivered has not any lien upon them. (*l*)

If deeds are deposited to secure an annuity which is void for non-compliance with the annuity-act, doubt seems to have been entertained whether the grantee has any lien upon the deeds. (*m*)

**AS TO THE LIEN EXTENDING TO FUTURE DEBTS.**

If a trader deposit a lease as a security for a debt to be contracted by him, it is not a security for a debt afterwards contracted by the debtor and another. (*n*)

If the evidence is contradictory, whether the deposit is for a debt due at the time of the deposit, or to extend to debts to become due, the court will inquire as to the extent of the deposit. (*o*)

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(*l*) *Norris v. Wilkinson*, 12. Ves. J. 199.

(*m*) *Ex parte Wright*, 1. Rose, 308.

(*n*) *Ex parte Anderson*, August 2, 1809.

(*o*) *Ex parte Mountfort*, 1808, 14. Ves. 606.

### Cases omitted.

If a ship is captured, and the master and part of the crew are taken into the enemy's port, and the ship is recaptured and delivered to the owner, the master does not lose his lien. (a)

If the owner of a ship let her for a voyage, and the freighter covenant to put on board a complete cargo, and that the freight and primage shall be paid, part in cash, and the remainder in good and approved bills, payable two months after date, from the day on which the delivery is completed; the delivery of the goods and the payment of the freight are concomitant acts; and the owner has a lien upon the cargo till the bills are actually delivered. (b)

If the purchaser give in payment his drafts at different dates, some of which are dishonoured, it does not divest the vendor of his lien. (c)

A London agent has a lien against the client of his country solicitor upon the papers entrusted by the client to the country solicitor, and by the country solicitor to

(a) *Ex parte Cheeseman*, in *re Welfitt*, March 31, 1763, 2. Eden, 181. The question upon this petition arose upon a claim by the master of a vessel to his lien upon the freight. The ship had been captured, and he, with several of the crew sent into the enemy's port. The ship was afterwards recaptured.—Lord Chancellor. "The master's right is founded on the principle of the specific lien of innkeeper, taylor, carrier, &c. extended by courts of equity to all cases of possession. He has a specific lien on the ship and cargo. His being taken, and by that means out of possession, can make no difference. The owner received the ship on her arrival, after the recapture, *loco magistris*, and as trustee for the master. If he had voluntarily quitted possession of the ship, that would indeed have made a difference." See ante, page 9.

(b) *Tate v. Meek*, 2. Moore, 278. *Yates v. Railston*, 2. Moore, 294. *Yates v. Mennell*, 2. Moore, 297. See ante, page 48.

(c) *Ex parte Peake*, 1816, 1. Mad. 348. See ante, note (w), page 79.

the agent, for the debt due from the client to the country solicitor. (d)

A London agent has, as it seems, a general lien against a country solicitor upon all the papers with which he is entrusted by the country solicitor. (d)

#### LIEN AGAINST THE CROWN.(e)

If goods be delivered to a factor for sale, and the factor accept bills for the principal upon the credit of such goods, and an extent is issued against the principal, and the goods in the factor's hands are seized by the sheriff, the factor has a lien upon the purchase-money against the crown. (f)

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(d) *Bray, &c. v. Hine and Fox*, 6. Price, 203. See ante, page 60.

(e) This should have been a separate head in page 75.

(f) *Rex v. Lee and others*, 6. Price, 369. See *Rex v. Sanderson*, 1. Wight, 50.

# APPENDIX

OF

## CASES.

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**HOSTLER'S CASE, 1605, YELVERTON, 66.**—*Popham* C. J. says, If a man bring an horse to an inn, and he leave him in the stable, without any special agreement to pay, the innkeeper is not bound to deliver the horse until the owner has paid his charges, but is justified in detaining him for his food and keeping: and when the horse has eaten as much as he is worth, the innkeeper, at a fair valuation may sell him, and the sale will be good at law. But in this case, though the horse had eaten double his value, the innkeeper could not sell him; for he had agreed for the rate of sixpence per day and night, and must abide by his agreement. So where a tailor has any clothes to make, and he make them accordingly, he is not bound to deliver them till he is paid for the making of them. But though he may detain them till paid for, yet he cannot sell them in default of payment. And the reason is this: that the keeping of the horse is attended with expense, but the keeping of the clothes is not.

**MORRIS v. CONHAM, 1609, OWEN, 123.**—*Foster, J.* He that hath the pawnee hath not such an interest in it as

he may deliver it over to another, or make a legall contract for it, and that his delivery being illegall, he cannot by his own wrong raise an action to himself, and a man shall never maintain any action, where the consideration is illegall and not valuable.—*Cook, Warburton, and Daniell* contra, He who hath goods at pawn hath a speciall property in them, so that he may work such pawn, if it be a horse or ox, or may take the cowes milk, and may use it in such manner as the owner would : but if he misuseth the pawn, an action lyes : also he hath such interest in the pawn as he may assign over, and the assignee shall be subject to a detinue, if he obtains it upon payment of the moneey by the owner, as in the 2. assise. Land was leased until he had raised 100*l*. he hath such interest as is grantable over. And *Foster* agreed to this, because it was agreed by *Cook* and *Warburton*, that when a man hath a speciall interest in a thing by act in law, that he cannot work it, or otherwise use it : but contrary upon a speciall interest by the act of the partie as in case of a pawn.—*Daniell*. There is difference between pawns, which are chargeable to the parties as cowes and horses, and things that are not chargeable, and also there is a difference between pawnes that will be the worse by usage, as clothes, &c. For if the pawn be the worse by usage, an action of the case will lie against him that hath them pawned to him : but contra of goods that are not the worse for usage.—And judgment was given for the plaintiff, and that they may be granted over.

*MOSS v. TOWNSEND*, 1612, 1. BULSTR. 207.—The custome of London as to innekeepers is this. If one brings a horse to an inne, leaves him there, and goes his way, and the horse eats up more than his price, by the custome of London, the innekeeper may sell this horse to pay himself, (but not if the debt was for other horses).



**ROBINSON v. WALTER**, 1616, 3. BULSTR. 269.—Trover. Defendant's plea in bar, was this, the defendant keeping a common inne, a stranger brings the plaintiff's horse into this common inne of the defendant's, there sets him for some time, and afterwards goes his way, leaving the plaintiff's horse there as a pledge for his meat.—The plaintiffe demurred.—*Montague*, Chief Justice. The custome of London is good and reasonable, how long to stay, not till he eats out more then his head; the innholder may sell him presently, and this is justifiable.—The opinion of the court was against the plaintiffe, that the demurrer was not good.

**CHAPMAN v. ALLEN**, 1632, CRO. CAR. 271.—An innkeeper or taylor may retain the horse or garment delivered them until they be satisfied; but not, when one receives horses or kine or other cattel to pasturage, paying for them a weekly summe, unless there be such an agreement betwixt them.

**CHAPMAN v. DERBY**, 1689, 2. VERN. 117.—The plaintiff, a factor, advanced money to his principal, relying on the credit of the cloaths. The clothier died, the administrator sues at law for the cloth, the factor in equity prays he may on account be allowed the monies he advanced.—*Per Cur. non allocat'*, for if there be debts of a higher nature, it will be a *devastavit* in the administrator, to pay or discount the plaintiff's debt.

**YORK v. GRINDSTONE**, 1699, 1. SALK. 388.—The court held; that innkeepers were bound to receive and entertain guests, and therefore might detain the goods of guests till payment; but the Chief Justice doubted whether the plaintiff was a guest, because he never went into the inn himself, but only left his horse there, which the

innkeeper was not obliged to receive.—*Powell, Powys,* and *Gould* contra, that the plaintiff is a guest by leaving his horse, as much as if he had stayed himself; because the horse must be fed, by which the innkeeper has gain; otherwise, if he had left a trunk or a dead thing.

**HARTFORT v. JONES, 1699, LORD RAYMOND, 393.**  
—Trover for goods. The defendant pleads, that they were in a ship, and that the ship took fire, and that they hazarded their lives to save them; and therefore they are ready to deliver the goods, if the plaintiff would pay them 4*l.* for salvage, &c. The plaintiff demurred generally. And *Holt* Chief Justice held, that they might retain the goods until payment, as well as a tailor, or an hostler, or a common carrier.

**ANON. 1700, 12. MOD. REP. 447.—Holt,** Chief Justice. Every master of a ship may detain goods till he be paid for them; that is, for their freight.

**SKINNER v. UPSHAW, 1701, LORD RAYMOND, 752.**  
—It was ruled by *Holt* Chief Justice that a carrier may retain the goods for his hire.

**YORKE v. GRENAUGH, 1702, LORD RAYMOND, 866.**—Replevin of a gelding. The defendant avows, for that the said inn, &c.; and that he being a common innkeeper, &c. Stable, corn, hay, &c. for the said gelding, *invenit ibidem*, &c.; and that he was not paid, neither by the traveller, nor by the plaintiff, nor by any other. The plaintiff pleads in bar of this avowry, that the defendant *ad tunc nec ad aliquod tempus postea* demanded of the plaintiff any sum for maintaining this gelding. Demurrer. And it was held by all, that the plea in bar was ill; for the innkeeper may detain for the meat, &c. of the horse,

without making a demand. *Per Curiam*. Supposing that this traveller was a robber, and had stolen this horse; yet if he comes to an inn, and is a guest there, and delivers the horse to the innkeeper, (who does not know it) the innkeeper is obliged to accept the horse; and then it is very reasonable that he shall have a remedy for payment, which is by retainer. And he is not obliged to consider who is owner of the horse, but whether he who brings him is his guest or not. And *Holt* Chief Justice cited the case of the *Exeter* carrier; where *A* stole goods, and delivered them to the *Exeter* carrier, to be carried to *Exeter*, the right owner finding the goods in possession of the carrier, demanded them of him, upon which the carrier refused to deliver, without being paid for the carriage. The owner brought *trover*; and it was held, that he might justify detaining against the right owner for the carriage; for when *A* brought them to him, he was obliged to receive them and carry them; and therefore since the law compelled him to carry them, it will give him remedy for the premium due for the carriage. The same reason holds in this case. [But *Powell* Justice said, that a carrier could not detain for his carriage; but note, the contrary has always been held by *Holt* Chief Justice at *Guildhall*.] If a man set his horse at an inn, though he lodge in another place, that makes him a guest, and the innkeeper is obliged to receive him; for the innkeeper gains by the horse, and therefore that makes the owner a guest, though he was absent. *Contra* of goods left there by a man, because the innkeeper has no advantage by them.

BALDWIN v. COLE, 1704, 6. MOD. REP. 212.—*Trover*. A carpenter sent his servant to work for hire to the queen's yard; and having been there some time, when he would go no more, the surveyor of the work would not let him

have his tools, pretending a usage to detain tools to enforce workmen to continue until the queen's work was done.  
 —Defendant was found *guilty*.

JONES v. PEARLE, 1722, 1. STRANGE, 556.—In trover for three horses, the defendant pleaded, that he kept a public inn at *Glastonbury*, and that the plaintiff was a carrier and used to set up his horses there; and 36*l.* being due to him for the keeping the horses, which was more than they were worth, he detained and sold them, *prout ei bene licuit*: and on demurrer judgment was given for the plaintiff, an innkeeper having no power to sell horses, except within the city of *London*. 2. Roll. Abr. 85. 1. Ven. 71. Mo. 876. Yel. 67. And besides, when the horses had been once out, the power of detaining them for what was due before did not subsist at their coming in again.

JONES v. THURLOE, 1722, 8. MOD. REP. 171.—The court was of opinion, that if a man lie in an inn one night, the innkeeper may detain his horses until he is paid for the expenses; but if he give him credit for that time, and let him depart without payment, then he has waived the benefit of that custom by his own consent to the departure, and shall never afterwards detain the horse for that expense.  
 —The Chief Justice, in the argument of this case, held, that though the innkeeper might detain a horse for his meat for one night, yet he could not sell the horse and pay himself.

LAWSON v. DICKENSON, 1724, 8. MOD. REP. 307.—The plaintiff had an estate mortgaged to him, and the defendant, who was *an attorney*, and who drew the mortgage, did by that means get all the deeds relating to the

title into his possession.—Upon a motion for a rule to deliver the deeds to the plaintiff, for that he (the defendant) made the mortgage, and therefore shall not be allowed any money due to him from the mortgagor, before or after the mortgage, but that he should deliver up the deeds upon payment of what is due for drawing and engrossing it.—The court was of opinion, that an attorney may detain papers until the money is paid for drawing them; but that he cannot detain any writings which are delivered to him on a special trust, for the money due to him in that very business; therefore a rule was made for the defendant to deliver those deeds to the plaintiff.

STONE v. LINGWOOD, 1725, 1. STRANGE, 651.—The plaintiff was captain of a ship, and the defendant owner: the plaintiff brought over a small parcel of elephants' teeth on his own account, and a large parcel for the defendant, who entered the whole at the Custom-house, paid the duty, and had the whole delivered out to him; and not re-delivering to the captain his parcel, an action of trover was brought. And it was insisted for the defendant, that the plaintiff should shew a tender of the duty, otherwise the goods were in the nature of a pledge, and he was not bound to deliver them: but the Chief Justice said, that would not justify the defendant in keeping them, for he had his action for the money; and if he would shew what the duty came to, it might be deducted in damages. Which was done accordingly.

FAREWELL v. COKER, 1728, 2. P. WILLIAMS, 460.—*Farewell* employed *Bower* as his solicitor, *Bower* employed *Edwards* as his clerk in court.—*Farewell* paid *Bower*. *Edwards* continued unpaid.—*Lord Chancellor*. If the country client pays his principal, who is the country

attorney or solicitor, he is thereby discharged, and must not pay the same debt twice. All I can do for the clerk in court is, to take no paper out of his hands till paid; and if any thing be remaining due in Mr. *Farewell's* (the country client) hands, I will stop it, and the same shall be paid to *Edwards* the clerk in court.

EX PARTE BUSH, 1734, 7. VIN. 74.—*Lord Chancellor*.—The attorney hath a lien upon the papers in the same manner against assignees as against the bankrupt, and though it doth not arise by any express contract or agreement, yet it is as effectual, being an implied contract by law; but as to papers received after the bankruptcy they cannot be retained.

GRAY v. COCKERIL, 1740, 2. ATKYNS, 113.—A clerk in court's lending a solicitor money to carry on a cause shall never entitle the clerk in court to detain the papers of the client as a pledge or mortgage for the money so advanced to the solicitor, but he shall deliver them up to the party, and get his money from the solicitor the best way he can.

HARTOP v. HOARE, 1742, 3. ATKYNS, 43.—Judgment in this case was given for the plaintiff.—The plaintiff being owner of the jewels, lodged them with other jewels for safe custody only in the hands of *James Seamer*, jeweller and banker, inclosed in a paper, which paper was sealed, and put in a bag, which was also sealed with the plaintiff's seal, and deposited them at *Seamer's* house in *Fleet Street, London*, and took a receipt for them.—*Seamer* broke both the seals, and took out the jewels, and carried them to the defendant's shop, which is a public open shop in *Fleet Street* in the city of *London*, where

the defendants carried on the business of bankers, and also traded in jewels, and frequently lent money on the security of jewels, and then and there the said *James Seamer* borrowed the sum of 300*l.* of the defendant, and deposited the jewels in the declaration mentioned, as his own proper goods, and as a security for the said sum of 300*l.*—The general question is, Whether Sir *John Hartop* the plaintiff, and owner of these goods, is barred from having the goods delivered to him?—*Seamer* had no kind of property either general or special; he came to the possession of the jewels by right originally, but when he broke the seal, and took the jewels out of the bag, and by that means enabled himself to deliver them openly to the defendants, he was possessor *malæ fidei*, and went to the defendants as such.—The present case therefore is like the case in 1. *Inst.* 89. where *A.* leaves a chest locked with *B.* and taketh away the key, there *A.* does not intrust *B* with the goods.

EX PARTE DEEZE, 1748, 1. ATK. 228.—Nicholls, a merchant, borrowed of the petitioner 500*l.* for which he gave a note of hand; afterwards he sent the petitioner, who was a packer, six bales of cloth to pack and press; some time after Nicholls paid off a part of the 500*l.* and interest for the remainder, and then asked the petitioner if he would have the whole paid off, which the petitioner declined, and then the old note was delivered up, and a new one given for the remainder: before the remainder was paid, and before the six bales were taken out of the petitioner's custody, Nicholls became a bankrupt.—A petition whether the petitioner could retain six bales till his whole debt was satisfied.—N. B. There were no goods in the hands of the petitioner, when he first lent the money, nor had there been dealings between them for many years.—In the petition ex-parte Deeze, the 8th of June, 1748, before me there was evidence, that it is usual for packers

to lend money to clothiers, and the cloths to be a pledge, not only for the work done in packing, but for the loan of money likewise.—It also appeared there was at the time of the bankruptcy 19*l.* due to Deeze for the packing and pressing these bales, and there was due from Deeze to Nicholls near that sum for wine.—*Lord Chancellor.* I am of opinion, that under the circumstances of the present case, the assignees have not a right to take those goods from the petitioner, without making him a satisfaction for his whole debt.—The question then will be, Whether there is any specific lien on those goods in the petitioner's hands, either by express contract, or from the nature of the dealing? if not, whether there is any mutual credit and account?—To be sure packers may retain goods till they are paid the price and labour of packing, and so other trades may retain in the like manner; therefore these goods were in the petitioner's hands in the nature of a pledge for some part of his debt, that is, the price of the packing; and what right has a court of equity to say, that if he has another debt due to him from the same person, that the goods shall be taken from him without having the whole paid?—In the case of *Demaindray v. Metcalfe*, before Lord Cowper, 2. Vern. 691, he said, he looked upon it as an account current between the pawner and pawnee: the present case I think is stronger; for here the goods are undoubtedly a pledge in the petitioner's hands for part of his debt.—It is very hard to say mutual credit should be confined to pecuniary demands, and that if a man has goods in his hands, belonging to a debtor of his, which cannot be got from him without an action at law, or bill in equity, that it should not be considered as mutual credit; and Lord Cowper's opinion plainly favours that construction, for he looked upon the jewels pawned, and notes given, as an account current between them.—And here, though if there had been no bankruptcy, in an action for these goods,



the debt could not have been set off; yet as the clause of mutual credit has been extended, I think it may come within that rule, especially as here is an account between them; on the one side 19*l.* due for packing, &c., on the other side much about the same sum due to the bankrupt's estate for wine.

EX PARTE OCKENDEN, 1754, 1. ATKYNS, 234.—*Mathews*, a flour factor, employed the petitioner as his miller, who had considerable dealings with *Mathews* in grinding of corn for him, on which account he was generally indebted to the petitioner in a large sum of money, who always had in his hands corn, meal, and sacks of *Mathews*, sometimes more, sometimes less, but for the most part sufficient to answer the sum due to the petitioner; and for this reason the petitioner gave *Mathews* a much greater credit than he would otherwise have done. —At the time *Mathews* became a bankrupt, he was indebted to the petitioner in 286*l.* 7*s.* 10*d.* for the grinding of corn, for which he gave two promissory notes of 100*l.* each, and which became due before the bankruptcy, and the petitioner at the same time had in his custody thirty-six loads and three bushels of wheat. There was likewise due to the petitioner 16*l.* 5*s.* for grinding of corn, which was in his hands at the time *Mathews* became bankrupt, making in the whole 302*l.* 12*s.* 10*d.* —*Lord Chancellor*. It lies upon the petitioner to shew he has any lien upon the corn, &c. in his hands; and as to the specific lien which he claims, I do not see there is a sufficient reason to consider it as such. In this case no evidence has been produced of any contract, that the debt which was owing to the petitioner should be a lien on the corn, &c. Nor is there any evidence, that there is any general custom with respect to millers that it should be a lien. There is then no specific lien, but what arises from that kind of bailment at

law, proceeding from a delivery of goods for a particular purpose, as in the case of a horse standing in the stable of an innkeeper, or cloth in the hands of a tailor, who have each of them a special property. The case of *Demaindray v. Metcalfe*, *Prec. in Chan.* 419, was a sum borrowed first on the pawn of jewels, and afterwards three more several sums borrowed, for each of which the pawner gave his note, without taking notice of the jewels; it was determined that the executors of the borrower should not redeem the jewels, without paying the money due on the notes: there it must have been presumed the ground and foundation of the pawnee's lending the money, was his having a pledge in his hands, and there is no pretence to say, it would have been a lien, if the money had been lent before the delivery of the goods, and it therefore turned upon its being a subsequent transaction.—The case of *Downman v. Mathews* and others, *Prec. in Chan.* 580, appears to be a transaction between a clothier and a dyer, and there was evidence that they always made up their accounts by giving mutual credit, the dyer on one hand for work done, and on the other hand, the clothier for his cloth.—In the petition *ex parte Deeze*, the 8th of June, 1748, before me there was evidence, that it is usual for packers to lend money to clothiers, and the cloths to be a pledge not only for the work done in packing, but for the loan of money likewise.—It must come then to the question upon the clause in the act of parliament relating to mutual credit; and I own I am extremely doubtful as to that.

EX PARTE SHANK, 1754, 1. ATKYNS, 234.—A person who had repaired a ship insisted he had a specific lien on the ship for the repairs.—After the ship had been so repaired, the workman delivered it to the bankrupt who employed him, and therefore *Lord Chancellor* was of

opinion he had no pretence, under the general law of the realm, to retain till he is paid; because it is out of his possession: and though the law of *Holland* gives a person who repairs a house or ship a specific lien, there is no such law in *England*.—If the ship had been repaired in a foreign port, while out upon a voyage, it would have been otherwise.

**BRENAN v. CURRINT, 1755, SAYER, 224.**—Agreement was entered into by plaintiff and the defendant, whereby the sum of ten shillings and sixpence was to be paid to the defendant, a farrier, for curing the plaintiff's mare of a distemper, and likewise a reasonable sum of money for keeping the mare, until she should be cured; the plaintiff tendered ten shillings and sixpence, and demanded the mare; the defendant refused to deliver the mare, unless the plaintiff would pay a gross sum of money for the cure and keeping of the mare.—*Ryder, Ch. J.*—It has been said, that a farrier has a right to detain a beast delivered to him to be cured, until the money due for keeping the beast is paid or tendered: but, it is not necessary to give any opinion upon this point; for although we should be of opinion, that a farrier has, in the general, such a right: yet it would be clear, that the defendant had not in the present case a right to detain the mare; because his general right to do this, in case he had such a right, was waved by the special agreement, that a reasonable sum of money was to be paid to him for keeping the mare, until she should be cured.

**EX PARTE EMERY, 1755, 2. VESY, 674.**—On a commission of bankruptcy the claim of the petitioners was, as they acted as factors for the purchase of goods, paid the whole money, and drew a bill of exchange, which was protested.—*Lord Chancellor.* In such case the

court has followed the specific effects in case of a factor or partnership to obtain compleat justice; and even where a note is taken by the bankrupt for the money, they followed that note; as was determined in *C. B.* in case of a sale by a factor, and no partnership, who laid out his money in purchase of goods; sent them to his correspondent in *England*, and drew a bill of exchange; the goods have come to the hands of the correspondent here, who has broke; the bill of exchange sent back protested, and the goods here at the time. It has been held to be a specific lien on those goods, and not suffered to go for other debts until the price for them was paid. That held in several cases, and lately by me in *Kruger v. Wilcox*. Let it be directed therefore according to the prayer of the petition.

**KRUGER v. WILCOX, 1755, AMBLER, 252.**—This cause coming on for further directions, the case was: *Mico* was general agent in *England* for *Watkins*, who was a merchant abroad, and at different times had received considerable consignments of goods, and upon the balance of account was in disburse. Afterwards *Watkins* consigned to him a parcel of logwood, for which he paid the charges, &c. *Watkins* coming to *England*, *Mico* said, as he was here, he might dispose of the goods himself: *Watkins* accordingly employs a broker to sell them, and *Mico* tells the broker, that *Watkins* intends to sell them himself, to save commission; and *Mico* gave orders to the warehouseman, to deliver the goods to that broker. The broker sells them, and makes out bills of parcels to *Watkins*; and opens an account with *Watkins*, but takes no notice of *Mico*.—After the goods were sold, *Mico* begins to suspect *Watkins*'s circumstances, and resorts to the broker, to know whether he has opened an account with *Watkins*.—The great question in the cause was, supposing *Mico*

had a lien on these goods and produce, so as to be entitled to retain them for the balance of the account; whether he has not parted with that right?—*Lord Hardwicke*. Two things are to be considered:—1st, What lien a factor gains on goods consigned to him by a merchant abroad? and whether *Mico* gained such lien in this case?—2nd, If he did, whether he has done any thing to part with it?—As to 1st. All the four merchants, both in their examination in the cause, and now in court, agree, that if there is a course of dealings and general account between the merchant and factor, and a balance is due to the factor, he may retain the ship and goods, or produce, for such balance of the general account, as well as for the charges, customs, &c. paid on the account of the particular cargo. They consider it as an interest in the specific things, and make them articles in the general account. Whether this was ever allowed in trover at law, where the goods were turned into money, I cannot say; nor can I find any such case. I have no doubt, it would be so in this court, if the goods *remained in specie*; nor do I doubt of its being so, where they are turned into money.—To 2nd question, I am of opinion, *Mico* has parted with his right, and that it is for the benefit of trade to say he has.—All the merchants agree, that although a factor may retain for the balance of an account, yet if the merchant comes over, and the factor delivers the goods up to him, by his parting with the possession he parts with the specific lien. Such is the law of the land as to retainers in other cases.—Question. Whether this case amounts to the delivery up of the logwood to the principal? I think it does. *Mico* suffers *Watkins* to employ a broker; and tells the broker, that *Watkins* intends to sell them himself, to save commission. *Mico* gives orders to the warehouseman to deliver the goods to the broker. The broker sells them,

and makes out bills of parcels to *Watkins*, and takes no notice of *Mico*. It amounts to the same thing, as if *Mico* had delivered the goods in specie to *Watkins*.—It is safer for trade to hold it in this manner, than otherwise; for by that manner of acting, *Mico* gave *Watkins* a credit with other people (for the sale was public, and by that the goods appeared to be *Watkins's*), which would not have been the case, if *Mico* had retained for the balance of his account.—It is better to allow that which is the public notorious transaction, than that which is secret. Suppose an action had been brought by *Watkins* against the broker, for money had and received, the broker could not have defended himself by saying, So much is due to *Mico*.—The merchants have admitted, that the specific lien as to the customs, charges, &c. does continue; even the law would have allowed it, if the goods had remained in specie; the goods being sold, makes the case stronger. But that is not now before me, being determined by his late Honour the Master of the Rolls, and acquiesced in by the parties.

EX PARTE ANDREWS, 1764, COOKE, 460.—Tolfrey, a linen-draper, was indebted to Andrews, a calico-printer, for printing and other work done by him to divers parcels of cotton and linen for Tolfrey, and also for money paid and advanced to the collectors for the duty for part of the linens. At the time he became bankrupt, he was indebted to Andrews in 312*l.* 2*s.* 9*d.* Andrews had linens then in his hands which belonged to the bankrupt, and were delivered by him to Andrews to be printed, of the value of 107*l.* 14*s.* 3*d.*—Andrews, on the contrary, contended, that he had a lien upon the linens in his possession, not only for the work done to them in particular, but also for former work done for the bankrupt of the like nature.—

*Lord Northington* ordered that *Andrews* should retain the value of the goods in his hands in part satisfaction of his debt, and that he should be at liberty to prove the residue under the bankrupt's estate.

GREEN v. FARMER, 1768, 1. BLACKSTONE, 651.—*Trover*. Verdict for the plaintiffs, on this special case. —Messrs. *Henzleman* purchased from the plaintiffs the goods in question, by their packer, and they were delivered to the defendants their dyers, to be dyed on their (Messrs. *Henzleman's*) account. Afterwards, Messrs. *Henzleman* and the plaintiffs agreed, that the plaintiffs should have their goods back again; who demanded them from the defendants, offering to pay what was due for the dyeing of them; but the defendants insisted upon being also paid a debt, due from Messrs. *Henzleman*, for dyeing other goods, over and above the price of dyeing these.—The occasion of Messrs. *Henzleman's* agreeing, that the plaintiffs should have their goods again, was their (the *Henzlemans*) having failed in their circumstances; and it was proved, that after notice of this failure, the defendants had delivered back eleven pieces to Messrs. *Aston* and *Hodgson*, which had, in like manner, been bought of them by Messrs. *Henzleman's* packer, and sent to the defendants to be dyed on Messrs. *Henzleman's* account, without insisting on being paid more than was due for dyeing the same; and they had also delivered back to the plaintiffs five pieces in white, without any thing being paid for them.—2*u*. Whether, under these circumstances, the defendants have a lien upon these goods, for any thing more than the price of dyeing the same.—*Lord Mansfield* delivered the opinion of the court. This case is the same, as if the action had been brought by *Henzleman*.—Natural equity is certainly much in favour of liens; so that courts of justice have always leaned that way, as far as was consistent with posi-

tive law. They will therefore imply a contract of lien, from the general course of trade, or from the nature of the particular mode of dealing between the parties. So where one has acted as a factor for another, every thing in his hands is construed to be a pledge.—Two remarkable cases have been cited at the bar, *ex-parte Deeze* and *ex-parte Ockenden*; both of them well reported by *Atkins*. If these two cases at all clash, the weight of authority is certainly more preponderant in the latter, which was more maturely considered. But I think them very consistent. A packer, according to the course of trade, is certainly entitled to a lien upon all goods in his hands, being in the nature of a factor.—Let me apply the principles of *Ockenden's* case to the present. Here is no factor, no agent, concerned: no transaction, but the mere manufacture of dyeing: no course of trade or general usage, to create a specific lien: no particular circumstances of their method of dealing with *Henzleman*. The very manner of dealing shews, they relied merely on his personal credit. We are therefore all of opinion, that the defendants had no lien in the present case, but for the price of the dyeing of these specific goods.

**DRINKWATER v. GOODWIN, 1775, COWP. 251.**—Action by the assignees of *J. Dowding*.—*J. Dowding*, the bankrupt, was a clothier, and employed *Jeffries*, a factor, who sold to *Goodwin*. The money was paid by *Goodwin* to *Jeffries*, after notice to him from the assignees not to pay it to *Jeffries*.—*Lord Mansfield*. The principal and factor enter into a special agreement, by which the factor undertakes and actually pledges his credit to raise money for the benefit of the principal: which money is to be worked up in cloths, and which cloths when so worked up the principal agrees to send to the factor. The agreement therefore is, that he shall have a lien. For he says,



"be security for the money, and I will send you all the cloths."—What is the form in which the transaction is put? The factor knew very well that for a general balance of his accounts he had a lien, but he doubted whether such lien would extend to a case in which he was only surety for his principal, and therefore he says, "I am led by the course of the trade, to let the money be a joint bond, &c." Therefore, we are all most clearly of opinion, that a factor has a lien on the price of goods in the hands of the buyer: and in this case, though he had not the actual possession of them; yet as he had a power of giving a discharge, or bringing an action, he had a right to retain the money, in consequence of his lien, as much as a mortgagee has by the title deeds of an estate in his hands, though he is not in possession.

**BUCKS v. BRISTEAD, 1777, 2. BLACK. 1171.**—Trove for a dog found at defendant's house.—The defendant said the dog strayed there casually; and demanded 20s. for twenty weeks keep, before he would deliver it up.—*Postea* for the plaintiff.

**WILKINS v. CARMICHAEL, 1779, DOUG. 97.**—Trove by the assignees of a bankrupt for a ship, of which the bankrupt was owner, against the captain.—The defence set up was, that the captain had a lien on the ship for his wages, and for stores, provisions, and repairs.—Verdict for the plaintiffs, subject to the opinion of the court.—The defendant, the captain, hespoke and directed repairs to be done to the ship before she set out upon her last voyage, and directed her to be supplied with stores and provisions. The defendant likewise had wages due to him. *Brooke*, the owner, became a bankrupt. *After the bankruptcy and demand*, the defendant paid the creditors their

bills for stores and repairs.—*Lord Mansfield*. He has set up a lien upon two sorts of claim, viz. wages, and stores and repairs. As to wages, there was no particular contract that the ship should be a pledge; there is no usage in trade to that purpose; nor any implication from the nature of the dealing. On the contrary, the law has already considered the captain as contracting personally with the owner: on this ground, prohibitions have been granted; and the case of the captain has in that respect been distinguished from that of all other persons belonging to the ship. As to stores and repairs, it is a strong answer to that claim, that when the demand was made by the assignees, the captain had not paid. But if there was any lien originally, it was in the carpenter. The captain could not, by paying him, be in a better situation than his; and he had parted with the possession; so that he had given up his lien if he ever had one. The other creditors had none. If the defendant is liable to the tradesmen, it is by his own act. Work done for a ship in England is supposed to be on the personal credit of the employer. In foreign ports, the captain may hypothecate the ship. The defendant might have told the tradesmen that he only acted as an agent, and that they must look to the owner for payment.—*Postea* to the plaintiffs.

*WHITEHEAD v. VAUGHAN*, 1785, *COOKE*, 579.—*Mr. J. Buller* considered it as a settled point, that there is a general lien on policies in the hands of the insurance broker.

*PARKER v. CARTER*, 1788, *COOKE*, 580.—The defendants contended they had, as policy-brokers and general agents of the bankrupt, a right to retain the whole money received from the underwriters, towards payment of the

balance due to them, and not merely, as was contended for the plaintiff, for the charge of the insurance.—And the court were of that opinion.

KINLOCH v. CRAIG, 1789, 3. TERM REP. 119.—Action for money had and received.—Verdict for the plaintiffs.—Motion for a new trial.—The plaintiffs claimed as assignees of *Sandiman* and *Graham*; the defendant was the sequestrator of *Steine*. It was proved that *Steine* used to send cargoes to *Sandiman* and *Graham*, and drew bills on them, which they accepted in confidence of the cargoes. That they had 1200*l.* per annum in lieu of commission, and a quarter per cent. commission, and 5*l.* per cent. for money advanced. That bills of lading were from time to time sent, sometimes indorsed, but more generally not. When the cargo in question arrived, *Sandiman* and Co. were under acceptances for 29,000*l.* on account of *Steine*, 1200*l.* of which were for this very cargo: before which time they had received the bill of lading of this cargo, unindorsed, and an invoice of the goods; and on the 15th of February had insured the cargo in their own names and at their own expense. The ship arrived at London on the 21st of February, the day after *Sandiman* and *Graham* had stopped payment; at which time they told the captain, on his recommending to them to unload immediately, that they did not think themselves at liberty to meddle with the cargo, as they were bankrupts; but on the 8th of March they paid the captain six guineas in part of freight. In the middle of March the captain for the first time refused to deliver the goods to *Sandiman* and Co.'s assignees. It further appeared that *Steine* had written to *Sandiman* and Co. to unload when the ship arrived.—*Ashhurst*, J. delivered the opinion of the court. Lord *Kenyon* having tried the cause, rather wishes to decline giving any opinion; but Mr. J. *Buller*

and Mr. J. *Grose* concur with me in thinking that there ought to be a new trial. The position laid down, that, as between consignor and factor, the latter has a lien on all consignments for the general balance, is certainly true; but it must be understood with this restriction, that he has obtained a possession of the cargo. I do not know of any case which goes the length of saying that the factor has a lien till he has obtained the possession of the thing which is the object of the lien. When he has got the possession, the goods are a pledge, and the principal shall not take it out of his hands till he pays him his due. But it has been contended, that by paying part of the freight he obtained a constructive possession; but that cannot be inferred from the act. He paid the money in quality of factor: therefore bare payment of a small part of the freight cannot be considered as taking possession of the cargo. If it were to be so considered, the payment of the part of the freight would be a direct fraud; for it was not paid till the day after he had stopped payment; and the law would never construe that which was in itself a fraud to vest a possession. But if the captain had in fact delivered the goods, he must have delivered the goods to him in the quality of factor. He had no right to deliver them to him as owner, without an indorsement of the bill of lading. If, indeed, *Sandiman* and Co. had once got the possession, they then might have insisted on their lien. The doctrine of liens ought to be governed by equitable principles.—Rule absolute.

The record was sent down to trial a second time, when a special verdict was found.—The court gave judgment for the defendant without hearing any argument, saying that the case as it stood now on the special verdict could not be distinguished from that which had come on before: whatever difference there was, made it still stronger against the plaintiffs; for it was now positively found that the bankrupts had refused to accept the

cargo, and never had possession thereof.—Judgment for the défendant.—A writ of error was afterwards brought in the House of Lords, where the judgment of B. R. was affirmed by the unanimous advice of all the other judges. And the Lord Chief Baron *Eyre*, in delivering the opinion of the judges, observed, that the bankrupts could have no lien in this case, as the special verdict found that the goods never got into their possession.

VANDERZEE v. WILLIS, 1789, 3. BROWN, 20.—Bill by the widow and executrix of *James Vanderzee* deceased, to redeem securities pledged by the testator to the house of *Moorhouse* and Co. bankers, of which the defendants are the present partners. The case was as follows: in the year 1778, the deceased kept an account with the house of *Moorhouse* and Co. as bankers; and, upon the 10th of *August* in that year, he borrowed of the then partnership 1000*l.* (having then 400*l.* in the hands of the house) and gave a promissory note, and deposited several bonds and other securities as a pledge for the re-payment thereof. These securities were frequently changed by *Vanderzee*; and as one was taken away, another of equal value was deposited in its room. In 1784, *Vanderzee* owing the above 1000*l.* and about 400*l.* on his banking account, the partnership required an assignment of the securities, and *Vanderzee*, being an attorney, prepared a bond and deed-poll for securing 1000*l.* although there were 400*l.* more then due; and *Vanderzee* overdraw his account, after the execution thereof, and was, at his death in 1785, indebted to the partnership in the sum of 541*l.* over and above the 1000*l.*—The bill prayed that the plaintiff might redeem, on payment of 1000*l.* and interest only, insisting that the deposit was made as a security for that sum only, and the rather as a larger sum was then due, and that the defendants had no lien on the securities

for any further sum, and also stated that the personal and fee-simple real estate of the testator were not more, or little more than sufficient to pay his specialty debts, and that a bill had been filed by creditors against the present plaintiff and the heir at law, in which suit there had been a decree for the creditors to come in.—The defendants insisted, by their answer, upon a right to retain the securities to the amount of their whole demand, stating their practice to be never to suffer a customer to overdraw his account more than 100*l.* without security, and that it was intended by the partnership that the assignment should cover as well the balance due, and to become due from *Vanderzee* on his cash account, as the 1000*l.* and interest; and that the partners always considered themselves to have a lien upon the securities for the whole debt.—*Lord Chancellor.* All the cases agree, that if the executor assigned the equity of redemption, it would put an end to the tacking: so it would if the specialty creditor brought the bill. I am afraid the rule has been laid down too broad, and that there being a decree for creditors to come in, they must redeem on payment of the 1000*l.* with interest.

*NICHOLSON v. CHAPMAN*, 1793, 2. H. BLACKSTONE, 254.—*Trover.* A considerable quantity of timber, the property of the plaintiff, was placed in a dock on the banks of the *Thames*, but the ropes with which it was fastened accidentally getting loose, it floated, and was carried by the tide as far as *Putney*, and there left at low water, upon a towing-path within the manor of *Wimbledon*. Being found in this situation, the bailiff of the manor, one *Fairchild*, employed the defendant *Chapman*, to remove the timber with his waggon from the towing-path which it obstructed, to a place of safety at a little distance. This *Chapman* accordingly did, and when the plaintiff sent to

demand the timber to be restored to him, refused to deliver it up, unless 6*l.* 10*s.* 4*d.* were paid, which he claimed partly by way of salvage, as a customary right due to the lord of the manor, and partly as a recompence to himself for the trouble of drawing the timber from the water side to the place where it then lay: but this demand the plaintiff refused to comply with, and did not tender any other sum.—Lord Chief Justice *Eyre*. The only difficulty that remained with any of us, after we had heard this case argued, was upon the question, Whether this transaction could be assimilated to salvage? The taking care of goods left by the tide upon the banks of a navigable river, communicating with the sea, may, in a vulgar sense, be said to be salvage; but it has none of the qualities of salvage, in respect of which the laws of all civilized nations, the laws of *Oleron*, and our own laws in particular, have provided that a recompence is due for the saving, and that our law has also provided that this recompence should be a lien upon the goods which have been saved. Goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempests, and accidents, (far beyond the reach of human foresight to prevent,) are hourly creating, and against which it too often happens that the greatest diligence and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them, that they are saved. Principles of public policy dictate to civilized and commercial countries, not only the propriety, but even the absolute necessity of establishing a liberal recompence for the encouragement of those who engage in so dangerous a service.—Such are the grounds upon which salvage stands; they are recognized by Lord Chief Justice *Holt* in the case which has been cited from Lord *Raymond* and *Salkeld*. But see how very unlike this salvage is to the

case now under consideration. In a navigable river within the flux and reflux of the tide, but at a great distance from the sea, pieces of timber lie moored together in convenient places; carelessness, a slight accident, perhaps a mischievous boy, casts off the mooring rope, and the timber floats from the place where it was deposited, till the tide falls, and leaves it again somewhere upon the banks of the river. Such an event as this gives the owner the trouble of employing a man, sometimes for an hour, and sometimes for a day, in looking after it, till he finds it, and brings it back again to the place from whence it floated. If it happens to do any damage, the owner must pay for that damage; it will be imputable to him as carelessness, that his timber in floating from its moorings is found damage feasant, if that should happen to be the case. But this is not a case of damage feasant; the timber is found lying upon the banks of the river, and is taken into the possession and under the care of the defendant, without any extraordinary exertions, without the least personal risk, and in truth with very little trouble. It is therefore a case of mere finding, and taking care of the thing found (I am willing to agree) for the owner. This is a good office, and meritorious, at least in the moral sense of the word, and certainly entitles the party to some reasonable recompence from the bounty, if not from the justice of the owner; and of which, if it were refused, a court of justice would go as far as it could go towards enforcing the payment. So it would if a horse had strayed, and was not taken as an estray by the lord under his manorial rights, but was taken up by some good-natured man and taken care of by him, till, at some trouble, and perhaps at some expense, he had found out the owner. So it would be in every other case of finding that can be stated (the claim to the recompence differing in degree, but not in principle); which therefore reduces the merits of this case to this short question, Whether every



man who finds the property of another which happens to have been lost or mislaid, and voluntarily puts himself to some trouble and expense to preserve the thing, and to find out the owner, has a lien upon it for the casual, fluctuating, and uncertain amount of the recompence which he may reasonably deserve? It is enough to say, that there is no instance of such a lien having been claimed and allowed; the case of a pointer dog, was a case in which it was claimed and disallowed, and it was thought too clear a case to bear an argument.—Judgment for the plaintiff.

EX PARTE LEE, 1793, 2. VESEY, 285.—A joint commission of bankruptcy issued against *Boylston*, as partner in the house *Lane* and *Frazer*. A separate commission also was taken out against him. The act of bankruptcy was committed by lying two months in prison. The joint commission was established, and the separate commission superseded. The attorney, who was concerned for the bankrupt, and in resisting the joint, and prosecuting the separate, commission, was in possession of papers relative to the bankruptcy, by delivery of the bankrupt previous to the commission, but subsequent to the arrest; and he claimed a lien upon these papers for the amount of his demand for business done. The object of the petition, by the assignees under the joint commission, was, to have all such papers, &c. delivered up to them.—*Lord Chancellor*. There is no pretence for a lien here. The attorney, who is fighting the separate commission, cannot have any lien upon papers against the general creditors. The relation is clear. I cannot help the statute. The law is positive. There can be no possible lien acquired after the first arrest.

DAVIS v. BOWSER, 1794, 5. TERM REP. 488.—This was an action of assumpsit by the plaintiffs as indorsees

of a bill of exchange for 635*l.* 10*s.* against the defendant as drawer. The defendant drew the bill in question on one *Ames*, payable to *Cook*, from whom he received no consideration for it. *Cook* was a trader at *Bristol*, and kept an account with the plaintiffs, who were bankers in the same place. The course of dealing between them was this: *Cook* lodged bills payable at future days with the plaintiffs from time to time, and drew upon them for any money he wanted in advance; and the plaintiffs charged no interest on these advances, but used to select out of the bills in their hands such as they pleased and were nearest to the sum advanced, and discounted these bills, debiting *Cook* with the amount of such discount in his account. On the 26th *February* the balance on *Cook's* account with the plaintiffs was 103*l.* in his favour. On the 27th he directed his clerk to pay in to the plaintiffs other bills to the amount of about 3000*l.*, which was done; and he applied for another advance, which the plaintiffs at first refused, but they afterwards consented to let him have about 1400*l.*, and actually entered the discount on such of the bills as they selected, *amongst which the bill in question was not one.* And on the plaintiffs refusing to make *Cook* any further advance, he demanded this and the other bills which had not been discounted, none of which were then due: but the plaintiffs refused to deliver any of them up, alleging their right to detain them all, in case any of the discounted bills should prove bad. Those discounted bills had longer to run than the bill in question. At this time none of the discounted bills had been dishonoured; though some of them, beyond the amount of the present bill, afterwards were so; and at the time of the demand and refusal the sums which the plaintiffs had advanced to *Cook* were considerably more than covered by the amount of the discounted bills in their hands, in the event of their proving to be good bills. Before this action was brought

*Cook* became a bankrupt, and the plaintiffs proved their debt under his commission for the balance of their account; and in the affidavit, usual upon such occasions, they swore that they had no security for their debt, except certain bills which they specified, and which only comprehended the discounted bills, and not the bill in question. There was also some evidence at the trial of the general custom of the bankers at *Bristol* to keep their accounts in the same manner as the course of dealing shewn between the plaintiffs and *Cook*; namely, that it was usual with them, upon any advance to a customer, who lodged bills in their hands, to apply such advance to the discount of particular bills, without any special agreement to that effect with such customer, or with a view to select such particular bills as the basis of the credit, or relinquish their general lien upon other securities. The cause was tried before Mr. Baron *Perryn* at the last assizes at *Bristol*, when the jury found a verdict for the plaintiffs; to set aside which a motion was made, and rule *nisi* granted in *Michaelmas* term last.—Lord *Kenyon*, Ch. J.—I disclaim grounding my opinion upon any particular law applicable to the City of *Bristol* only: I am clearly of opinion, that by the general law of the land a banker has a general lien upon all the securities in his hands belonging to any particular person for his general balance, unless there be evidence to shew that he received any particular security under special circumstances, which would take it out of the common rule. But it is taken for granted by the counsel in support of the rule, that the party had a right to demand of the bankers certain bills, which were not discounted, without paying their general balance; and the whole argument is built on that mistake. I think he had only a right to demand this bill *sub modo*, namely, on paying all that was then due to the bankers: for wherever a banker has advanced money to another, he has a lien on all the paper securities which

come into his hands for the amount of his general balance. It has been urged that the bankers abandoned their general lien in this case, by applying the money advanced to the discount of a particular bill; but nothing appears to warrant such a supposition. So long as they were in advance upon the general account, they had a right to charge interest whether in one shape or another. But whether they could charge interest upon any particular bill, provided they were not in advance upon the general balance, is a question not necessary to be decided now; but upon which they may possibly find themselves mistaken whenever it comes to be fully canvassed. I see nothing however in this case contrary to the general rule of law, and the practice amongst bankers. It is very proper that there should be a known rule to govern the conduct of all persons of this description, whose dealings are very extensive; and that rule is, that no person can take any paper securities out of the hands of his banker, without paying him his general balance, unless such securities were delivered under a particular agreement, which enables him so to do. If we were to set aside this verdict, we should unsettle that which has always been considered as the law on this subject, and the constantly received course of trade founded upon that law. I am therefore clearly of opinion, that we ought not to treat this even as a doubtful question, but that we should discharge the rule for a new trial.—*Ashhurst, J.*—I entirely concur in opinion with my Lord that the general rule is, that bills paid into a banker's hands generally can at no time be taken away from him, until the party has paid him his general balance. Here the bills were paid in upon the general account, and the balance not being settled at the time when they were demanded, the party had no right to insist upon receiving them. It would be inconvenient to commerce in general, and injustice to the plaintiffs in this particular case, to set aside the verdict which has been

given.—*Grose, J.*—The question is, Whether under the circumstances of this case the bankers had not a lien upon all the paper securities in their hands for the amount of the general balance? The evidence goes to shew that they had, according to the general dealing and understanding between the parties; and the jury having given credit to this evidence, I see no reason to find fault with their verdict, more especially as it is according to the real justice of the case.—Rule discharged.

*NAYLER v. MANGLES, 1794, 1. ESP. 109.* Assumpsit for money. The plaintiff had purchased from one *Boyne* twenty-five hogsheads of sugar, then lying in the warehouses of the defendant, who was a wharfinger. *Boyne* was in debt to the defendant to the amount of 167*l.* part of which only was for the charges of these twenty-five hogsheads of sugar: the remainder was for the balance of a general account, for which the defendant claimed a lien.—*Lord Kenyon* said, liens were either by common law, usage, or agreement. Liens by common law were given where a party was obliged by law to receive goods, &c.; in which case, as the law imposed the burthen, it also gave him the power of retaining for his indemnity. This was the case of innkeepers, who had by law such a lien. That a lien from usage was a matter of evidence. The usage in the present case had been proved so often, he said, that it should be considered as a settled point that wharfingers had the lien contended for.

*WALKER v. BIRCH, 1795, 6. TERM REP. 258.*—On the trial of this action for trover for cotton before Mr. *J. Lawrence* at *Lancaster*, a special case was reserved, of which the following is the substance. In *March, 1793*, and for several years before, *Caldwell* and Co. were partners as bankers; two of the partners, *Caldwell* and *Smyth*,

resided at *Liverpool*, the other two, *Forbes* and *Gregory*, in *London*. On the 18th of *March*, 1793, they became bankrupts: and on the same day *Greaves* and *Denison* also became bankrupts in consequence of the failure of *Caldwell* and Co. Previous to the above bankruptcies, the cotton, for the recovery of which the action was brought, was deposited with *Caldwell* and Co. by Messrs. *Hodgsons* as a security for money which had been advanced to *Hodgsons* by *Caldwell* and Co. At the time of the bankruptcy of *Caldwell* and Co. Messrs. *Hodgsons* were indebted to them in a large sum of money. *J. Forbes*, jun., who was not a partner with *Caldwell* and Co., was on the 11th of *March*, 1793, sent down from *London* to *Liverpool* to procure bills of parcels of goods, which goods were to be deposited in the name of *J. Forbes* with brokers in *Liverpool*; and on which a large sum of money was intended and expected to be raised. In consequence thereof, on the 13th of *March*, 1793, the cotton in question was put into the hands of *Greaves* and Co. by *Caldwell* and Co. to procure the advance of money by the security of brokers' certificates to be made out to *J. Forbes*; and thereupon *Greaves* and Co. gave the following acknowledgment or receipt: "*Liverpool*, 13th *March*, 1793, Received from Mr. *J. Forbes*, jun. (so many bags of cotton, marked, &c. amounting to, &c.) for sale; for the net proceeds of each parcel when and as received we promise to be accountable and to pay the same to the said Mr. *J. Forbes*, jun., or his order." Such deposit was made, and such acknowledgment given to *J. Forbes*, jun., in order to enable *Caldwell* and Co. to obtain a loan of money for the accommodation of themselves and of *Forbes* and *Gregory*, on whom they drew bills in *London*. *J. Forbes* returned from *Liverpool* to *London* on the same 13th of *March*, 1793, after the delivery of the cotton in question, taking with him the bills of parcels and brokers' certificates

of the goods so deposited. On his arrival in *London* on the 15th of *March*, the bills of parcels and brokers' certificates were produced to the friends of *Caldwell* and Co. and of *Forbes* and *Gregory*; but a difficulty arose in raising the money. On the night of the 15th of *March* it was found that *Forbes* and *Gregory* must become bankrupts; and on the 16th they did become bankrupts. *Greaves* and Co. were indebted to *Caldwell* and Co. at the time of the bankruptcy of the latter in 1625*l.* 15*s.* 5*d.* for cash and bills advanced by *Caldwell* and Co. Of the bills so advanced by *Caldwell* and Co. for *Greaves* and Co., bills to the amount of 1187*l.* 10*s.* 10*d.*, have not been paid, and the same have been proved by the holders at the time of the bankruptcy of *Caldwell* and Co. against the estate of *Caldwell* and Co. and of *Forbes* and *Gregory* who had accepted the same, and also against the estate of *Greaves* and Co. Previous to the bankruptcy of *Caldwell* and Co. and of *Greaves* and Co. several bills of exchange, amounting to 7000*l.* were drawn by *Caldwell* and Co. on *Forbes* and *Gregory* in favour of *Greaves* and Co. and indorsed by them; which bills were so drawn and indorsed at the request and for the account of *G.* and *H. Browne*, who are now bankrupts. Other bills of exchange to the amount of 5106*l.* 8*s.* were likewise drawn by *Caldwell* and Co. on *Forbes* and *Gregory* in favour of *Greaves* and Co. and indorsed by them, and they were so drawn and accepted at the request and on the account of *J. P. Richard* who is still solvent. The above bills were charged by *Caldwell* and Co. in their books to the several accounts of *G.* and *H. Browne* and *J. P. Richard* respectively, and not to the account of *Greaves* and Co.; and *G.* and *H. Browne* and *J. P. Richard* were respectively indebted to *Caldwell* and Co. at the time of the bankruptcy of *Caldwell* and Co. on the balance of accounts. None of these bills were in the hands of *Greaves*

and Co. at the time of their bankruptcy, nor were they then due, nor have the defendants yet paid any dividends thereon; but all or the greater part of them have been or may be yet proved against the estate of *Greaves* and Co. as the indorsers, as they have been already proved against the estate of *Caldwell* and Co. as drawers, and of *Forbes* and *Gregory* as acceptors. The plaintiffs, when they demanded the cotton in question, (which was before the action was brought,) tendered to the defendants fifty guineas, which exceeds any demand that *Greaves* and Co. or the defendants had against *Caldwell* and Co. or the plaintiffs, or *J. Forbes*, jun., independently of such right as the defendants may have to detain the cotton as an indemnity against any payment which the defendants may eventually make as dividends on the above indorsements of the bills so drawn by *Caldwell* and Co.—Lord *Kenyon*, Ch. J. There is no doubt, and indeed the point has been so long settled that it ought not now to be brought into dispute, but that in general a factor has a lien for his general balance on the property of his principal coming into his hands. But the question here arises on the application of that proposition to the present case. It is a maxim as old as our law, *conventio vincit legem*. The parties may, if they please, introduce into their contract an article to prevent the application of a general rule of law to it. In order to determine the present case, it is not necessary to consider how the case would have been, if there had been no express stipulation between the parties in this case; for the whole resolves itself into this, that the goods in question were deposited with the defendants for a particular purpose. It does not appear that it was known that *J. Forbes* was the agent of *Caldwell* and Co.: as between him and them it was perfectly well understood; but his situation with them does not seem to have been communicated to *Greaves* and *Denison*. And indeed it is of little



importante whether it were or not; since the cotton was deposited with them by *J. Forbes* for the particular purpose mentioned in the note signed by them, and a special receipt was given by them for it: in that note they acknowledged that they had received the cotton for sale, and promised to pay the proceeds of it when sold to *J. Forbes* or his order. The lien which a factor has on the goods of his principal arises upon an agreement which the law implies: but where there is an express stipulation to the contrary, it puts an end to the general rule of law. Here the parties are bound by their express stipulation, which excludes all ideas of a lien; and the goods in question, not having been sold, are to be returned to the plaintiffs who represent *Caldwell* and Co. The goods are the property of the plaintiffs; they are in the possession of the defendants, who have refused to deliver them: these propositions have been made out in this case, and nothing is stated on behalf of the defendants which can justify their detention of the goods.—*Ashhurst, J.* The difficulty in this case has arisen from the multiplicity of facts stated in it; for when they are simplified, the question admits of no doubt. The general rule of law that a factor has a lien on the goods of his principal for his general balance is not disputed: but here the goods were deposited in the hands of particular factors for a particular purpose, which is stated by the factors themselves in their receipt; and this negatives the general rule respecting liens.—*Grose, J.* declared himself of the same opinion.—*Lawrence, J.* The doctrine of liens only applies to cases where goods have been deposited in the nature of a pledge. Now here *Greaves* and *Denison* never acted as the brokers of *Caldwell* and Co. before this transaction. Then how can it be considered that these goods were deposited with the former as a general pledge? No money was advanced by them on the goods in question: the cotton was placed in their

hands for a special purpose, namely, for sale: but it was not sold, and the brokerage had not commenced; and if so, there is no pretence to say that they have any lien on the cotton for the balance of their accounts.—Postea to the plaintiffs.

READ v. DUFFER, 1795, 6. TERM REP. 361.—The principal cause of action, which was for business done by the plaintiff for the defendant, was agreed to be referred to the master, who awarded a certain sum to be paid to the plaintiff together with costs. The plaintiff afterwards threatened to take the defendant in execution, unless the money due to him was immediately paid; whereupon the defendant's attorney, after notice from the plaintiff's attorneys not to pay it to the plaintiff himself because their bill was not satisfied, paid the whole sum to the plaintiff himself. In consequence of which the plaintiff's attorneys applied to this court in the last term, and obtained a rule calling on the defendant's attorney to shew cause why it should not be referred to the master to see what lien the plaintiff's attorneys had upon the debt and costs recovered in this action as against the plaintiff himself, and why the defendant's attorney should not pay over that sum to the plaintiff's attorneys.—Lord *Kenyon*, Ch. J. The principle by which this application is to be decided was settled long ago, namely, that the party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances, at whose expense, those fruits are obtained. If, indeed, the money had been paid over *bonâ fide* to the plaintiff before notice from his attorney of his lien, such payment would have been good; but here the payment was made in violation of the notice, which cannot be suffered. In *Welch v. Hole*, Lord *Mansfield* compared this to the case of an assignment of a chose in action, which indeed in

legal strictness cannot be done; but still according to the rules of equity and honest dealing, if the assignee give notice to the debtor of such assignment, he shall not afterwards be suffered to avail himself of a payment to the principal in fraud of such notice.

**SWEET v. PYM**, 1800, 1. EAST, 4.—In trover for certain bales of cloth. The facts appeared to be these. The bankrupt a clothier residing in *London*, before his bankruptcy employed the defendant, a fuller residing in *Exeter*, in his business; and at the time of the transaction aftermentioned, the bankrupt was indebted to the defendant upon the general balance of accounts in more money than the value of the goods in question: and by the custom of the trade at *Exeter* the defendant had a lien for his general balance. The cloths for which the action was brought had been sent by *Gard* before his bankruptcy to the defendant to be fulled as usual: and after they were finished the defendant, in consequence of prior orders from *Gard*, shipped them on board a certain vessel at *Exeter* to be forwarded to him in *London*, and sent the invoice to *Gard*. No bill of lading was signed by the captain at the time of the shipment: but soon after the vessel sailed, *Pym*, hearing of *Gard*'s bankruptcy, followed and overtook the captain off *Deal* in his passage to *London*, and there procured him to sign a bill of lading to *Pym* or his order, by virtue of which *Pym* obtained the delivery of the goods on their arrival in *London*.—At the trial before Lord *Eldon* at the last assizes for the city of *Exeter*, the plaintiffs recovered a verdict under his Lordship's direction, he being of opinion that no person having a lien on goods, can, if he part with the possession, afterwards stop them in transitu, and thereby revive his lien against the owner. But he gave the defendant's counsel leave to move this court to enter a nonsuit, if they should be of a diffe-

rent opinion.—Lord *Kenyon*, Ch. J. The right of lien has never been carried further than while the goods continue in the possession of the party claiming it. Here the goods were shipped by the order and on account of the bankrupt, and he was to pay the expense of the carriage of them to *London*: the custody therefore was changed by the delivery to the captain. In the case of *Kinloch v. Craig*, where I had the misfortune to differ with my brethren, it was strongly insisted that the right of lien extended beyond the time of actual possession; but the contrary was ruled by this court, and afterwards in the House of Lords: though there the factor had accepted bills on the faith of the consignments, and had paid part of the freight after the goods arrived.—*Grose*, J. I consider the delivery of the goods by *Pym* to the captain to be equivalent to a delivery to *Gard*.—Rule refused.

*SPEARS v. HARTLY*, 1800, 3. *ESPINASSE*, 81.—This was an action of trover for a log of mahogany. The defendant was a wharfinger, and claimed a lien on it, as well for the wharfage as for the balance of a general account; which balance was due in the year 1790, under which lien he justified a right to retain it.—Lord *Eldon* referring to the case of *Naylor v. Mangles*, said, this point has been ruled by Lord *Kenyon*, that a wharfinger has a lien for the balance of a general account, and considered as a point completely at rest; I shall, therefore, hold it as the settled law on the subject, that he has such a lien as is claimed in the present case.—It appeared that the balance which the defendant claimed to be due, and under which he entitled himself to a lien, had accrued in the year 1790, and so was barred by the statute of limitations; the debt being therefore discharged by operation of law, the defendant could not be entitled to any lien by virtue of it.—Lord *Eldon*. If what has been stated by the defen-

dent's counsel be law, that the debt is *discharged* by the operation of the statute of limitations, no lien could be obtained by reason of it; but the debt was not discharged, it was the remedy only: I am of opinion, that though the statute of limitations has run against a demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien. In this case the defendant had a subsisting demand when the goods came to his possession; and I am of opinion he may enforce it by the lien which the law has given him for his general balance.

RICHARDS v. BORRETT, 1800, 3. ESPINASSE, 102.  
 ---Assumpsit for money had and received. The defendant being in the Fleet Prison, and distressed for money, had applied (by means of one *Bryant*, an attorney) to the plaintiff, to borrow some; the plaintiff lent him some money, and took from the defendant a bond and warrant of attorney, to secure an annuity. Shortly after, the defendant applied through the same channel to the plaintiff, to borrow more money; the plaintiff required a further security than a bond and warrant of attorney; and the defendant deposited with him the lease of a farm in *Kent*, which he represented as unincumbered; and it was endeavoured to be proved, that he meant to charge this real property with payment of an annuity for the latter sum advanced; but the defendant's counsel asserted that it was only deposited with a view to secure the payment of the rent by the tenant in discharge of the annuity.——The proof not coming up exactly to that point, Lord *Kenyon* said, it had been held in equity, that depositing all, or even part of the deeds respecting real property, implied an intention of charging the real estates, and gave the party a lien upon them; and that as this was an equitable action, he would hold the same doctrine.——No memorial of the first an-

nulty had been registered, nor had any deed to charge the real property with the second annuity been registered; and the annuity having been in arrear, the present action was brought to recover the consideration-money.—No application had been made to the court to set aside the first annuity; and *Erskine*, for the defendant, contended, that the securities were only voidable; and that being still in existence, the present action could not be maintained.—Lord *Kenyon* thought the objection was well founded with respect to one annuity: the party should be called upon to complete the securities; and those for part having been completed as far as the party had been called upon, they must be considered as valid until set aside by the court; but, with respect to the other, the defendant not having done, or being unable to do, that which he had undertaken; namely, to charge the real estate, the plaintiff was entitled to recover the consideration-money of that annuity.—A verdict was found, by consent, for the consideration-money of both annuities.

WELDON v. GOULD, 1801, 3. ESPINASSE, 268.—Trover for a quantity of calicoes.—Plea of Not Guilty.—The case was, that the plaintiff had delivered the calicoes to one *Pearce*, to have them printed; he delivered them to the defendant, who was a calico-printer: the defendant did not know that the goods did not belong to *Pearce*; and he kept the goods for the balance of a general account between *Pearce* and him.—Lord *Kenyon* said, that he thought the plaintiff had a lien for a general balance; and that the same point had been before decided, that calico-printers had such a lien; but that it must be for work done in the course of that business, for which the lien was claimed;—they could not claim a lien for money lent, or for any collateral matter: it should be confined to work done in the particular business. As to

the second point, he was of opinion, that if the goods were taken in by the defendant as the goods of *Pearce*, who was his debtor, and ignorant that the property belonged to another, he thought the lien extended to those goods, and gave the defendant a right to hold them. It was like the case of a factor, where, if the person who deals with a factor, receives goods from him as his own, he has a right to hold them for a debt due by the factor, and against the rightful owner; and cited *George v. Claggett*, 7. Term Rep. 359. It would therefore be necessary for the defendant to shew, that there was such a balance due to the defendant, as entitled him to hold the goods as a lien. The defendant did give that evidence, and had a verdict.

MAANSS v. HENDERSON, 1801, 1. EAST, 335.—  
In assumpsit. The case was, that the plaintiff, being a *Prussian* residing at *Stettin* in *Prussia*, and owner of the ship *Gustav*, consigned the said ship in 1796 to *Jennings* of *Liverpool*, with orders to charter her with salt on the plaintiff's account from *Liverpool* to *Riga*, and to effect an insurance thereon. *Jennings* opened the policy in the usual way in his own name with the defendants, who were brokers residing in *Liverpool*, with whom he had before been in the habit of effecting insurances on account of others as well as for himself. Nothing was said by *Jennings* on this occasion whether the policy were opened on his own or any other account, except that he said it was *neutral*; and the policy itself, though effected in the name of *Jennings*, was warranted *neutral*. This was done on the 14th of *October*, 1796, and it was not till the 31st, after *Jennings* stopped payment, that he told the defendants that he was only an agent in this transaction, and named to them his principal, the present plaintiff. The ship sailed on the voyage insured, and meeting with bad

whether an average loss was incurred, to recover which this action was brought. At the time of *Jennings's* failure he was indebted to the defendants on the general balance of accounts for premiums on this and other insurances to a greater amount than the average loss in demand in this action, and for which the defendants were accountable; and the question was, Whether they were entitled to retain in this action as having a lien on this sum in their hands for such general balance as between them and *Jennings*? At the trial at the last Sittings at *Guildhall*, the jury, by the direction of Lord *Kenyon*, found a verdict for the plaintiff for the amount of the average loss, deducting the amount of the premium upon this policy; his Lordship being of opinion that the information conveyed by *Jennings* to the defendants at the time, that the interest was *neutral*, was a sufficient indication to them that he was only acting as agent for another in that transaction, though the principal's name was not then disclosed; and consequently that the defendants had no lien upon the policy as against the plaintiff for their general balance against *Jennings*, but only for the amount of the particular premium. A rule nisi having been obtained for setting aside the verdict and granting a new trial, on the ground of a misdirection in this respect.—Lord *Kenyon*, Ch. J. said that he remained of the same opinion as at the trial. If the agent disclose his principal at the time, it is clear that he cannot pledge the property of such principal to another with whom he is dealing for his own private debt. It is true that he did not name him at the time, but he did in effect the same thing by saying it was for a neutral. Supposing the agent had said to the defendants, It is true I am agent for a foreigner, but nevertheless you may retain the money due to him for my debt; could such a transaction be sustained? But that which is now contended for is in effect



the same thing. All therefore that the defendants can retain for is the amount of the premiums due on this policy on the part of the plaintiff.——Rule discharged.

*ORMEROD v. TATE*, 1801, 1. EAST, 464.—This cause being at issue at *York Spring Assizes*, 1800, the parties entered into bonds to refer it to arbitration, and the arbitrator awarded the defendant to pay to the plaintiff 26*l.* by two instalments; 10*l.* on the 24th of *May*, 1800, and the remaining 16*l.* on a certain future day. On the 16th of *May* the plaintiff's attorney, having been informed that the parties intended to settle the matter between themselves for the purpose of ousting him of his lien on the costs, served the defendant with notice to pay the amount of the damages and costs to him, and not to settle the same with the plaintiff or any other person, as he had a lien upon the costs for his fees, &c.; notwithstanding which the defendant on demand of the first instalment by the plaintiff's attorney when it became due, refused to pay it to him; but paid it over to the plaintiff himself, and obtained from him a receipt in full of all demands: and then told the attorney he would never pay him a shilling, and he might get his costs how he could. Thereupon a rule was obtained on the part of the plaintiff's attorney, calling on the defendant to shew cause why he should not pay him his costs in this cause out of the money awarded to be paid by the said defendant to the plaintiff, and also the costs of this application.——*Lord Kenyon*, Ch. J. The convenience, good sense, and justice of the thing require that an attorney should have the same lien on damages awarded as if they were recovered by the judgment of the court in the ordinary course of the cause. The public have an interest that it should be so; for otherwise no attorney will be forward to advise a reference. As to the right of the plaintiff to release any part of the damages, it is out of the

question here; for this appears to be no other than a mere shuffle between the plaintiff and defendant to cheat the attorney of his lien. Therefore, *Per Curiam*, rule absolute for the defendant forthwith to pay over to the plaintiff's attorney 10*l.* the amount of the first instalment awarded to be paid to the plaintiff, and to pay the remaining instalment when due to the plaintiff's attorney.

WHITE v. BARING, 1801, 4. ESPINASSE, 22.—This was an action of assumpsit, brought on a bill of lading, by the captain against the defendants, as consignees of the cargo, to recover the amount of the freight and primage. —Per Lord *Kenyon*. The creditor of a ship has a threefold security: the ship itself, the owners, and the captain. The captain is liable by reason of the contracts into which he enters on the ship's account; but having contracted and made himself liable for articles furnished to the ship, he thereby acquires a lien on the goods, as well as freight: and I am of opinion, that his lien is co-extensive with his liability to the ship's creditors. If, therefore; the plaintiff can shew that goods were furnished to the ship by his direction, and on his credit and account, I shall hold his lien on the freight to extend so far; and, of course, that the payment to that extent, made by the defendants, has been made in their own wrong.

SAVILL v. BARCHARD, 1801, 4. ESPINASSE, 55.—This was an action of trover for a quantity of baize.—The plaintiff was a manufacturer, and had sent up the goods in question to Messrs. *Green and Walford*, his factors, in the month of *December*, 1796. At that time there was a war with *Spain*; but it was expected that peace would shortly take place, when there would be an opportunity of exporting them. *Green and Walford* spoke to *Lucas and Bentley*, who dealt in commodities for the

*Spanish* market, telling them that they had the goods in question, which, when dyed, would suit that market; and wishing *Lucas* and *Bentley* to take them. *Lucas* and *Bentley* agreed to take them; but no price was then fixed, as that was to be determined by the event of a peace. The defendants were dyers, and were applied to by *Lucas* and *Bentley* to dye the baize. It was agreed that they should send for them for the purpose of dyeing, and so preparing them for the market, on the event of a peace taking place. The defendants accordingly sent for the baize; and they were delivered to them: and the names of *Lucas* and *Bentley* put on them by the defendants. *Lucas* and *Bentley* having become insolvent while the goods remained in the hands of the defendants, the plaintiff demanded them as his property: the defendants refused to deliver them, claiming a lien on them for the balance of a general account due by *Lucas* and *Bentley* to them.—It appeared that the defendants did not know that the goods were the property of the plaintiff; on the contrary, Mr. *Bentley* swore, that he believed the defendants conceived them to be absolutely the property of himself and his partner, and that a sale of them had taken place, though the price had not been fixed, nor a bill of parcels delivered.—The plaintiff's counsel relied on the case of *Green v. Farmer*, in which it had been expressly decided, that though dyers might have a particular lien for work done on any specific parcel of goods delivered them to dye, they had none for the balance of a general account.—The defendants' counsel called several witnesses, to prove that the lien claimed by the defendants was considered in the trade as unquestioned, and was sanctioned by constant use and practice. One witness swore, that, having retained a quantity of goods belonging to an insolvent estate under a similar claim of lien, the assignees had brought an action against him, in which he

had succeeded. Other witnesses swore, that they always understood it to be the practice of the trade; but not being able to prove any particular instances in which it had been asserted, Lord *Kenyon* said, that their evidence went for nothing. One witness, who had been in the trade for thirty years, swore positively, that he had, in many instances, claimed the lien, and in some very recent ones against insolvent estates; and that such claims had been acquiesced in.—Lord *Kenyon* said, that the courts of law and the understandings of people in general, had gone much in favour of liens: that it was established in the case of bankers, packers, and wharfingers, that they were entitled to such lien. That in the case of *Green v. Farmer*, Lord *Mansfield* held, that liens arose either from the express agreement of the parties,—from the particular mode of dealing between the parties,—or from the general course and practice of the trade; but in that case, there was no evidence of a lien on any of those grounds; and it was therefore properly held, that there was no lien founded on any such custom: But in the present case, there was strong evidence to prove the general course and practice of the trade, and to establish a lien founded on them. It was a question of great general importance. He was of Lord *Mansfield's* opinion in the case of *Green v. Farmer*, that a lien was established by the general course and practice of the particular trade; and if the jury thought that such was the general course and practice of the trade, they should find for the defendants.—The jury found a verdict for the defendants; thereby establishing the principle, that dyers have a lien for the balance of a general account.

**HAMMONDS v. BARCLAY, 1802, 2. EAST, 227.—**Assumpsit for money. Verdict for the plaintiffs with 2566*l.* 19*s.* 6*d.* damages, subject to the opinion of this court.—In April, 1799, the testator *J. Blight*, who

was then resident in *Jamaica*, and the owner of the ship *Julius Caesar*, having on board a general cargo on freight for *London*, addressed the said ship to *Fentham*, his correspondent, in *London*; and wrote him a letter dated the 17th of that month to this effect: "I am now loading the ship *Julius Caesar* for *London* addressed to you, and I requested you to effect insurance on freight of the ship 4000*l.* sterling; say 4000*l.* sterling on ship *Julius Caesar*, *James Adams* master, from *Black River*; warranted to sail with convoy. I have also to request you to effect a further insurance on 50 tons of logwood." This letter was received on the 30th of *July* following. On the 9th of *May* in the same year, *Blight* wrote a second letter to *Fentham*, which arrived in *August* following, in which he says: "I hope my letters arrived in time for you to effect the insurance on the freight of the ship *Julius Caesar*, as I mean to draw on you for 2000*l.* sterling in part. You have my instructions to sell this vessel as soon after her arrival as possible. I think she will on inspection command 5500*l.* sterling, ships being much in demand: but at all events sell her." On the 1st of *May* the ship sailed from her port of loading for her place of rendezvous at *Jamaica* to join convoy; and on the 2nd of *June* *Blight* died: intelligence of which event having reached Captain *Adams* before the ship's departure from the place of rendezvous, he applied to the plaintiffs as executors, both of whom then resided in *Jamaica*, for instructions how to proceed; who thereupon directed Captain *Adams* to follow the instructions he had before received from the testator. In consequence of the above two letters from *Blight*, *Fentham* effected an insurance on the freight of the *Julius Caesar*, the premiums of which amounted to 98*l.* 10*s.*: but a return of premium was afterwards made to the amount of 57*l.* And he also accepted three bills of exchange drawn upon him by *Blight*, two of which bills he

duly paid before his bankruptcy to the amount of 650*l.*; and the remaining bill for 1000*l.* is now outstanding against him. The said insurance was effected; and the acceptances were given by *Fentham* before the ship's arrival in *England*, and before he had received any intimation of the death of *Blight*. On the 30th of *September* the *Julius Caesar* arrived at *London*, and the captain, in consequence of the instructions he had previously received, immediately put her under the charge of *Fentham*, and delivered over the ship's register to him: after which the latter disbursed a further sum for seamen's wages and the necessary use of the ship, to the amount of 490*l.* 3*s.* 6*d.* On the 14th and 21st of *July* in that year, the plaintiffs wrote to *Fentham* from *Jamaica*, which letters were respectively received by him on the 3rd and 16th of *September* following; in the first of which, after communicating the death of *Blight* and their appointment as his executors, they say, "The *Julius Caesar* after incurring a very extraordinary expense in her outfit, &c. sailed with the last fleet:" and in the second letter they say, "We observe you have effected insurance to the amount of 4000*l.* sterling on freight, and 2000*l.* on logwood, per ship *Julius Caesar*. As the wood has not been shipped, you will of course have the policy cancelled, and the necessary returns for short interest made. Captain *Adams's* account is likewise unsettled; but as Mr. *Hammonds*, who has copies of his several accounts, will be in *London* about the time you receive this, you will be able to settle with him." Soon after the arrival of the ship, *Fentham* gave directions to Messrs. *Hopkins* and *Gray*, ship-brokers in *London*, to sell the ship and collect the freight. Shortly after which *Fentham* became bankrupt, and a commission issued against him, under which the defendants were chosen assignees. Since which time Messrs. *Hopkins* and *Gray* have sold the ship and collected the freight due upon the said voyage, and have

accounted with the defendants, and paid over to them the sum of 2556*l.* 19*s.* 6*d.*, part of the net proceeds thereof. The question for the consideration of the court was, whether the defendants as assignees of *Fentham* have any, and what lien upon the ship, or freight, or the proceeds thereof; so as to be entitled to set off in this action the whole or any part of the disbursements or acceptances.—*Grose*, J. now delivered the opinion of the court. In this case the plaintiffs claim, not in form but in substance, as executors of *James Blight*, a sum of money 2556*l.* 19*s.* 6*d.*, the produce from the sale of the ship *Julius Cæsar*, received by the defendants as assignees of *Fentham* a bankrupt: and the question is, Whether, as such assignees, they have any, and what lien upon the ship, or freight, or proceeds thereof; so as to be able to set off what has been paid by *Fentham* in the disbursements and acceptances stated in the case? A lien is a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied. That the defendants have a right to retain 490*l.*, part of the sum insisted upon as due to the defendant, is admitted. That they have no right to retain 312*l.* 10*s.*, the balance of premiums paid upon the insurance account, nor the 650*l.* upon the bankrupt's acceptances, nor that which the defendants are liable to pay on the acceptance of the bill for 1000*l.*, is insisted: because whatever authority the testator gave was countermanded by his death. The evident consideration upon which the premiums for insurance and the amount of the two bills were paid, and the third accepted, was the consignment of the ship and cargo: and it does not seem very consistent with justice to say, that after the consignee had advanced the premiums, and paid bills on the credit of the consignment, the death of the consignor should operate as a revocation, so as to prevent the bankrupt and his assignees

having the fruits of that which was the foundation and consideration upon which he disbursed his money. But as between the plaintiffs, his executors, and the bankrupt, (and his assignees stand in his shoes,) there is another clear decisive answer; which is, that they affirmed the orders of their testator, and directed the captain to follow the instructions before received from him, which were to effect insurance on freight of the ship 4000*l.* sterling, as he meant to draw on him for 2000*l.* in part; to sell the vessel as soon after her arrival as possible; at all events to sell her. Then the plaintiffs write to the bankrupt, affirming his acts; ordering him to get a return of premium on account of logwood not shipped; and to settle Captain *Adams's* account. By their authority then he was in possession of the ship, and is entitled to retain out of the proceeds whatever he has expended by the testator's or their order; they standing in the shoes of the testator, and representing him, as the defendants represent the bankrupt. Upon these grounds we are of opinion that there is no foundation for the above objection; but that the bankrupt having been in possession of the ship, and having sold it, and received the proceeds both by the authority of the testator and the plaintiffs his executors; and that the money being paid and the bills accepted upon the credit of the ship and cargo consigned to him; his assignees, the defendants, have a lien upon such proceeds for the several sums of 312*l.* 10*s.* for premiums advanced; 650*l.* money paid on two bills accepted; and 490*l.* sailors' wages; and for such sum as they shall be compelled to pay upon the third acceptance for 1000*l.*; and that the case of *Kinloch v. Craig*, the authority of which was relied on to prove that the bankrupt had no lien for the acceptance which he has not paid, does not rule this case. For there *Sandiman and Co.* had never possession of the property on which they claimed a lien, as *Fentham* had in this case: and that



case only determined that a person making himself liable by his acceptances did not thereby prevent the consignor's right of stopping in transitu, in case of his insolvency: and it did not decide, that when a man had in his possession the effects, on the credit of which he had made acceptances, that he might not retain those effects until he was indemnified against the liability to which he had subjected himself.—Postea to the defendant.

**MANN v. SHIFFNER, 1802, 2. EAST, 523.**—Action for money had and received. A verdict for the plaintiff for 500*l.* subject to the following case.—*R. Heath*, a planter in *Jamaica*, for a valuable consideration in money paid to him by one *Allen* as agent to the plaintiff and *L. Parkinson*, drew bills of exchange on Messrs. *Atherton* and *Astley* of *Liverpool*, the merchants of *Heath*, in favour of the plaintiff and *Parkinson*, which *Atherton* and *Astley* refused to accept (not having funds in their hands of the drawer *Heath*), and the same were returned. The share of *Parkinson* in these bills was afterwards paid: and on the 18th *July*, 1800, *Heath* shipped in *Jamaica* on board the *Hero*, Captain *Lightfoot*, for *Liverpool*, 25 tierces of sugar, to be delivered to the order of the shipper, for which Captain *Lightfoot* signed a bill of lading, and upon which bill of lading, delivered by *Heath* to *Allen*, the following indorsements were made. (1st indorsement.) “Captain *Lightfoot*. Sir, If Messrs. *Atherton* and *Astley* will engage to pay the net proceeds of the within-mentioned 25 tierces of sugar to the order of *W. Allen*, you will in that case deliver them to the said Messrs. *Atherton* and *Astley*; but if they do not so engage, &c. you are then to deliver the same to the order of the said *William Allen*, who is entitled and hereby authorised to recover and receive the amount insured on the same in case of loss, having received value for the same this 19th day of *July*,

1800. *Richard Heath.*" (2d indorsement.) "To Captain *Lightfoot.* Sir, If Messrs. *Atherton* and *Astley* engage to pay the net proceeds of the within-mentioned 25 tierces of sugar to *L. Parkinson* or his order, you will in that case deliver the said sugar to the said Messrs. *Atherton* and *Astley*, otherwise you are to deliver them to the order of the said *L. Parkinson*; value received of him in *Jamaica.* (Dated) 23d *July*, 1800, (and signed) *William Allen.*" (3d indorsement.) "I hereby assign, transfer, and set over to *James Mann* pursuant to the directions of *W. Allen*, all the right, title, property, and interest vested in me to the within bill of lading and to the contents, by virtue of the above indorsement from the said *W. Allen* to me. (Dated) 18th *March*, 1801, (and signed) *L. Parkinson.*" *Allen* transmitted the bill of lading with the two first indorsements thereon to *Parkinson* for the use of himself and the plaintiff; and when *Parkinson* had received the money due to him from *Heath*, he made the 3rd indorsement on the bill of lading, and delivered it to the plaintiff. Before the sugars were shipped, viz. on the 17th of *June*, 1800, *Heath* wrote a letter to Messrs. *Atherton* and *Astley*, in which, after noticing his engaging so many tierces by the ships *Hero* and *Bacchus*, their delay in sailing, and the uncertainty of the crops, &c. he directs them to "insure by ship or ships at and from *Montego Bay* as interest may appear." In consequence of this letter, Messrs. *Atherton* and *Astley* wrote to the defendants as follows: "Messrs. *Skiffner* and *Ellis*, *Liverpool*, 2nd *September*, 1800. Please to insure 1000*l.* on sugars as interest may appear valued at 20*l.* per hogshead on ship or ships at and from *Jamaica* to *Liverpool* on account *R. Heath.* The *Hero* and the *Bacchus* are mentioned as likely to have most of the property on board." In pursuance of this letter, the defendants as agents caused the insurance to be made in the

same terms as directed, which policy has ever since remained in their possession. The ship *Hero* sailed from *Jamaica* in *January*, 1801, and was lost on the 12th *February*, 1801. After the loss, the plaintiff being then possessed of the bill of lading, tendered to the defendants the premium paid on effecting the policy, and demanded the policy of them, which they refused to deliver. And after he had discovered that the underwriters had paid the loss to the defendants, he demanded of them the money which they had so received, but which they refused to pay. At the time the insurance was ordered, and also when it was effected, *Heath* was the debtor of *Atherton* and *Astley* as his merchants and factors to a larger amount than the sum insured; and the defendants, as the insurance brokers of *Atherton* and *Astley*, were their creditors to more than the sum recovered upon the said policy; which debts remained unsatisfied: and the reason assigned by the defendants for retaining the policy and the sum recovered thereon when the same were demanded by the plaintiff was, that *Atherton* and *Astley* were creditors of *Heath*, and debtors to the defendants; and the defendants insisted they had a lien upon the policy and the money recovered thereon for the balance due to them by *Atherton* and *Astley*, which balance exceeded the sum recovered from the underwriters. On the 1st *January*, 1801, *Atherton* and *Astley* stopped payment. The question for the opinion of the court was, Whether the plaintiff were entitled to recover in this action? If the court were of opinion that the plaintiff was entitled to recover, the verdict to stand, and the damages to be settled by arbitration: but if the court should be of a different opinion, then a verdict to be entered for the defendants.—Lord *Ellenborough*, Ch. J. now delivered the judgment of the court in favour of the defendants. Their opinion, he observed, was not founded on any right which the defendants had to retain

the policy from the plaintiff on the ground of having a lien on it to satisfy their claim on *Atherton* and *Astley*; but considering them as the servants of *Atherton* and *Astley*, who were entitled to hold the policy as against the plaintiff, who claimed from *Heath* the consignor until their claim on *Heath* was satisfied on the score of their general balance. The case, he added, had been obscured by bringing forward the defendant's lien instead of that of *Atherton* and *Astley*, in whose hands the policy was to be considered as in effect remaining. Then as the plaintiff could only have recovered the policy out of the hands of *Atherton* and *Astley*, by satisfying their lien, so the same lien attached on the proceeds of that policy recovered from the underwriters; and as that lien exceeded the plaintiff's demand, the defendants, as servants of *Atherton* and *Astley*, were entitled to retain the whole in this action.—Postea to the defendants.

OPPENHEIM v. RUSSELL, 1802, 3. BOSANQUET and PULLER, 42.—Trover for goods. At the trial before Lord Alvanley, Ch. J. at the Guildhall Sittings after last Michaelmas Term, it appeared from admissions that the defendant was a common carrier from London to Exeter and Plymouth, and as such received the goods in question from the plaintiffs, by whom they were consigned to the house of Negretti and Co. at Plymouth; that Negretti and Co. when they ordered the goods to be sent gave no directions respecting any particular carrier, and that there was another carrier from London to Plymouth besides the defendant; that previous to the arrival of the goods at Plymouth, Negretti and Co. had failed, and a notice had been given to the defendants by the plaintiffs not to deliver them to Negretti and Co., the plaintiffs at the same time tendering to the defendant his charge of 1*l.* 7*s.* 2*d.* for the carriage of the goods, and offering to indemnify him; that

the carriage of the goods was to have been paid by *Negretti and Co.* if the goods had been delivered to them; and that the sum of 4*l.* 7*s.* was due from *Negretti and Co.* to the defendant for the carriage of other goods; that the defendant offered to deliver the goods to the plaintiffs on their paying him the two sums of 4*l.* 7*s.* and 1*l.* 7*s.* 2*d.* and indemnifying him; that the defendant in *January*, 1801, gave public notice by circulating hand-bills and advertisements in the *London Gazette* and other newspapers, that all goods which should be delivered for the purpose of being carried, would be considered as general liens, and subject not only to the money due for the carriage of such particular goods, but also to the general balance due from the respective owners to the proprietor of the waggon, and and that one of the above mentioned hand-bills had been delivered to *Negretti and Co.* at their shop in *February* last. The defendant then offered evidence to shew that it was the usage among carriers to retain for their general balance, but Lord *Alvanley* rejected the evidence, being of opinion that it was not admissible, and that the consignor's right to stop *in transitu* could not be affected by such an usage if established. A verdict was found for the plaintiffs, with liberty to the defendant to apply to the court for a new trial.—Lord *Alvanley*, Ch. J. The question before the court is, Whether the evidence which was offered at *Nisi Prius* was properly rejected, considering for what purpose that evidence was adduced? This was an action brought by the plaintiff as consignor, against a carrier for the recovery of goods; and it is stated upon the case that the goods were demanded by the plaintiffs before they either actually or constructively reached the hands of the consignee. According to the general rule the carrier under these circumstances was bound to deliver them, and was liable, as Lord *Kenyon* very properly determined, to an action of trover if he did not deliver them,

Though no act of seizure ensue, yet if tender be made of the sum due for the carriage, the person sending the goods has a right to resume them ; and that was done in this case. The defence set up by the carrier is this. " It is very true I have not delivered the goods either actually or constructively into the hands of the consignee. I am a carrier, and have not delivered them at the place of their destination ; but I and the rest of my trade have established an usage which is evidence against all persons who make use of us as common carriers, which usage is that the person to whom goods are consigned shall not be entitled to take them out of the carrier's possession, or bring an action for the non-delivery of them until he has paid not only for the carriage of those goods, but all the balance he may happen to owe for the carriage of other goods." Evidence was offered at the trial to prove this usage, in order to raise against the plaintiff this defence, namely, that he was bound by this usage, and that the carrier acquired as against him and his right of stopping *in transitu* the same right of detainer as against the consignee. I am now satisfied that I ought to have admitted that evidence for the purpose of proving the usage, if when proved it would be of any use : for whatever doubts I entertained at the trial, I see that by an authority, to which I bow, it has been determined that this sort of usage may be adduced in evidence with a view of establishing in particular trades that sort of lien which I am sorry has of late years grown so much into fashion, and has I think been too much favoured. In *Kirkman v. Shawcross* it was published in newspapers, and all the world were apprised that a particular class of traders, such as dyers, bleachers, &c. would not take any goods to be manufactured in a particular way unless subject to a general lien as against the person sending them. But there the person sending them was the person with whom the contract was made, and he had full knowledge

of the usage. Indeed I think there is a great distinction between that case and the case of a carrier or an innkeeper; in the former the trader may or may not take goods to bleach at his option, and nobody can compel a man to bleach for him; therefore he who sends goods to a bleacher sends them upon an implied contract that his goods shall not be redemanded by him but upon payment of the bleacher's general balance. I was of opinion that though that evidence of usage might be admissible in that case, it was inadmissible in this case, because if proved it would not affect the consignor's lien, and I am of that opinion still; and if I or my brothers had any doubts upon it we would comply with what has been suggested at the bar, namely, agree to put this case in a shape in which the question might be finally determined; but as we have no doubts at present, and as it is a case of little consequence in point of value, we shall in the present stage deliver our opinions; and if the parties are desirous of having this point more solemnly determined, they may bring it forward in a case of more importance. We are called upon to say that this usage set up by the carriers on the western road ought in point of law to prejudice that right which is now as firmly settled, and as much a legal right as any other; namely, the right of a consignor who has delivered goods to a common carrier to reclaim those goods before they have come into the actual or constructive possession of the person to whom they are addressed. I confess I thought the proposition a monstrous one when first stated; and I still think it impossible to maintain that an agreement between the consignees of goods and the carriers upon the western road can put an end to the right of stopping *in transitu* vested in the consignors of goods before that agreement existed. It was admitted that if the consignee had made an assignment of the goods, his assignee could not have defeated the rights of the consignor. Then

if he could not do it by assignment, how can he by any agreement with the carrier? for the carrier comes in under the consignee. In the argument the rights of third persons were pushed forward: and most unquestionably they cannot be affected by the right of the consignor to stop *in transitu*: for if by any thing that had happened to the goods where they were deposited, any person had acquired a right in those goods before they became the property of the consignee, the consignor could not have resumed them without satisfying that right; but he can resume them without satisfying any rights derived under the consignee, if he claim to resume them before they come into that situation which gives the consignee a complete dominion over them. Perhaps there is a little difficulty in stating the several rights of consignor and consignee. It has been determined that the moment goods are delivered by *A.* to a common carrier; to be by him forwarded to *B.* the property vests in *B.*, and if they are lost, he, not the consignor, is the person to bring an action for that loss. This, it was contended, decides the present point. But we must recollect that though the property be in the consignee, still it is liable to be divested by the consignor under certain circumstances, and when the right of resumption is exercised by the consignor, the property is revested in him. Though the consignee be the person who must sustain any loss happening to the goods, and therefore the carrier is principally his agent, still he is so far the agent of the consignor, that the law has said, the consignor has a right to take the goods out of the hands of the carrier at any time before delivery to the consignee. My brother *Lens* put a case, which I do not think so clear as he seemed to consider it, namely, that if the sheriff had found these goods upon the road, and seized them under a *fi. fa.* in satisfaction of a debt due from the consignee to a third person, the consignor's claim to resume the property after such a



seizure could not have availed him. Whether the sheriff can make them absolutely the goods of the consignee by stopping them before they come to his hands, appears to me very doubtful. At any rate that is not the present case. Here neither the consignee nor any body claiming under the consignee had attempted to reduce the goods into actual possession before the claim of the consignor. They remained therefore in the hands of the carrier in the same state as when they were first delivered. There is no evidence whatever in this case of the consignor having had any actual notice that this defendant, as a carrier, would take no goods but what were liable to this new lien. Indeed my own opinion at present is, that he had no right to make such terms with the consignor; and I hope it will never be established, that common carriers who are bound to take all goods to be carried for a reasonable price tendered to them, may impose such a condition upon persons sending goods by them. Then the single question in this case is, whether a stipulation between the consignees and carriers on the western road, that the latter shall retain as against the former for their general balance can take away that common law right which is now firmly established, namely, that till goods have reached either the actual or constructive possession of the consignee, the property in them may on certain events revert back to the person by whom they were delivered into the hands of the carrier. The carrier's claim here is in contravention of that right; for there is no third person to whom any right is derived from the consignor. With respect to the argument adduced from the decisions in favour of indorsees of bills of lading, it is to be observed, that in those cases the consignor himself had enabled the consignee to raise money upon his goods, and it would have been monstrous to permit the consignor after a credit obtained by means of his own bills of lading, to take the goods out of the hands of an assignee

in fact claiming under himself. Under these circumstances, therefore, I am of opinion that the evidence offered was not admissible for the purpose for which it was offered.—

*Heath, J.* I am of the same opinion; and I found my judgment upon a few principles which I think steer clear of most of the cases cited. In the first place it is clear I think, that the right of seizing *in transitu* by the consignor is a common law right; and that it is so is evident, because it may be the foundation of an action of trover. In the next place, I think it is a right arising out of the ancient power and dominion of the consignor over his property, which at the time of delivering his goods to the carrier he reserves to himself. Then the third principle I shall lay down is this, without impeaching any of the cases which have been adjudged, that there is a certain privity of contract between the consignor and the carrier; and it is evident that there is that privity of contract from this consideration, that if, for instance, the consignee has run away and cannot be found, or if the consignee will not take to the goods, but will say "I did not order these goods," or I countermand them; and will not accept them," in either of these cases the carrier may come upon the consignor for the carriage of the goods, which he could not do unless there was a privity of contract between him and the carrier. Then if this is a power reserved out of the ancient dominion the consignor has over his property, it is paramount to any sort of agreement as between the carrier and consignee. As I put the case just now, suppose the consignee is not to be found to receive the goods, could the carrier in such a case say "there is a running account between me and the consignee, and therefore I will make you the consignor pay the consignee's balance?" Certainly he could not. But if it was in the power of a carrier to create this lien, which I very much doubt as well as my Lord, he might say to the consignor "you owe me money

upon another account, and you shall not have these goods unless you pay me as well for the carriage of these goods, as for the running account between us in respect to the other goods." It is unnecessary for the court at this time to deliver any opinion concerning the legality of this lien, or how far it may properly operate, but I think it is an extremely doubtful matter for the reasons my Lord has given.

—*Rooke, J.* This right to stop the goods *in transitu* I must consider as a legal right. Our courts of common law recognise it, and they distinguish between the constructive and the actual delivery of goods. This distinction is mentioned by Mr. Justice *Buller* in delivering his opinion in the case of *Ellis v. Hunt*. Where there is an actual delivery the *transitus* is at end; but where the delivery is constructive or fictitious, there the law considers that as a delivery to certain purposes only; for it is a fiction of law, and that fiction of law must work equity. Now the fiction is this, that it is a delivery so far as to make the carrier answerable to the consignee, to whom he has undertaken to carry them; but the fiction is never carried so far as to deprive the consignor of his right to resume them, if stopped before they have actually got to the possession of an insolvent consignee. This is an equitable and just right. But I can never assent to a doctrine so discreditable to our courts of law as that, because it is equitable and just, that it is therefore not strictly legal. Though a just and equitable right, it is a legal right too, and not a right which needs the aid of a court of equity. Then, what is the claim set up by the defendant? It is a claim founded on a special agreement only. I call it a special agreement for this reason, that it is not founded on general principles of justice, but on particular usage. That usage is presumed to have been founded on contracts repeated so frequently and so notorious, that every body must be considered as bound to take notice of it. Supposing it

therefore to be any right at all, it is a right founded only upon this sort of special agreement. If indeed it was a claim founded upon general principles of universal justice, it ought to be the law of the land, and we should not want any evidence of that which is agreeable to law and justice. The very circumstance, therefore, of admitting evidence in this case shews, that it is not founded on universal right, but on special usage only. The contract itself is a very singular one: for, generally speaking, carriers have extricated themselves from the rules of law by making special acceptances. Now we know that a special acceptance can only be made with the consignor or his servant when he brings the goods: it cannot be made with the consignee. Nor can the consignor agree that the consignee shall not take the goods until he shall have paid the general balance; for in order to make such an agreement, he must delay sending the goods until he could receive an answer whether the consignee would consent to it. It is, therefore, to say no more of it, a very extraordinary case. It is not likely that the consignor would waive his own right of stopping *in transitu*, when the special acceptance was required of him: and the special agreement of the consignee ought not to bind the consignor's right of stopping *in transitu*. Then with respect to the usage itself as laid down, my Lord has made an observation very material in my view of the question, which is, that a carrier is bound to carry at all events, and the law gives him a special lien upon the goods. If the consignee is in arrear with the carrier, it is the carrier's own *laches*. Why then is he to engraft this new lien upon his own *laches*? However, if he choose to do it, and can establish the principle upon which it proceeds (to which I am by no means ready to assent) still it will be founded only on a special agreement. Now I rather think that the practice has originated thus. The carrier has carried goods to the consignee, and has refused to

deliver them unless he has been paid a general balance; the answer made by the consignee has been, "Rather than have two actions I will pay the demand," for he must himself bring an action in order to recover the goods from the carrier, and then the carrier would have an action against him for the general balance; and rather than submit to two actions, consignees have suffered such a usage as this to creep in; and having done it in several instances, the carriers have availed themselves of it, and have published their hand-bills about town, and now they endeavour to set it up as an universal usage: but it is to be remembered, that this is an usage founded solely on their own *laches*, for they have a lien by the law of the land for the carriage of the goods. At all events, however, it is nothing more than a special contract between the carrier and consignee: and if it be a special contract on their parts, how is that special contract to interfere with the legal right allowed to the consignor of stopping *in transitu*? I think the common law right of the consignor is paramount, and it shall not be affected by a special agreement between the consignee and the carrier, even supposing that such an agreement could be established. This I say without giving a direct opinion whether that agreement may or not be established by evidence. Then the question directly before the court is, Whether a new trial should be granted because the evidence has not been received? If it were a question merely as between consignee and carrier, to be sure this evidence should have been received, and then the court would have had to decide upon the legality of this special usage between the parties: but if it cannot affect the right of third persons, it was useless to receive it; and being useless in this case, I am of opinion with my Lord Chief Justice and my brother *Heath* that no new trial should be granted.—*Chambre, J.* I think this modern doctrine of altering the liability to which the common law subjects

parties and vesting in them new rights by presumed agreements arising from the publication of certain notices, has been extended as far or rather farther than it ought to be upon principles of public policy. If the doctrine were to be carried the length which was intimated when this rule was first applied for, the consequences would be monstrous; but that a notice published by carriers in hand-bills or in the public papers is to subject the goods of every man who happens to employ a carrier to the payment not only of the price of the carriage or to any debt which he himself may owe on the score of carriage to that carrier, but to the debts of another man, is so manifestly unreasonable and so monstrous, that I think no legal agreement can be implied from such a notice. Indeed that point seems now to be pretty much abandoned; and the right which the carrier claims in this instance he endeavours to derive from the consignee himself. It is going a good way to bind even the consignee of goods by an agreement of this kind: for goods may be sent without his choosing any carrier, or directing by whom they are to come. He orders goods generally; and yet he is to be bound by an implied agreement with a particular carrier who happens to bring those goods. But it is not material to consider that question at all in this instance; the merits of this particular case have been so fully entered into by my Lord and my brothers, who have already spoken, that I shall be very short in what I have to observe upon this subject. I will take it for granted upon this occasion (though perhaps it is not very fully proved) that the delivery to the carrier was, to all intents and purposes, a delivery to the consignee, that is a qualified, not an absolute delivery; but that sort of delivery which would entitle the consignee to have brought his action against the carrier for the loss of his goods, and is a good delivery to all intents and purposes, excepting that of defeating the right of the consignor to stop *in transitu*. In the cases

which have been decided, particularly in the last case in the court of *King's Bench*, there has been what the court considered as a special direction with respect to the carrier who was to bring the goods. The court seemed to consider that as a delivery under the special order of the consignee, and the decision goes a good deal upon that ground. But I would suppose upon this occasion that as the goods must come by land-carriage, it was sufficient to deliver them to any carrier coming from the place from whence the goods were ordered, and that there was a complete delivery to the consignee; that is, such a delivery as I before stated. Now it is contended on the part of the carrier, first of all, that this right of stopping *in transitu* is a right in equity. I do not know what is meant by that argument. If it be a right in equity, every thing done in courts of law to enforce this right has been wrong. It is argued, indeed, that it is a legal right founded upon equitable principles; but that does not seem to be a very precise definition of the right. Then it is contended that this right is not to affect the right of third persons. No proposition can be more true; but is it true that it does affect the right of third persons? It is said that the consignee has notice of the conditions upon which the carrier received the goods; be it so; but in that case the carrier must derive his right from that consignee. Can he have a greater right than the consignee himself has? If he derive his right from the property he supposes to be vested in the vendee, he can have only a similar interest in the property with the vendee. It is beyond all question, that the carrier has a lien for the labour that he has bestowed as against the consignor in the carriage of the particular goods; that lien is satisfied, the money having been tendered to him, and he having refused to accept it. Now what pretence is there to go farther, even if it were admitted that by publications of this sort carriers could affect the consignor? I do not think the

notice published upon this occasion goes the length of affecting the consignor beyond that lien which the carrier has for the carriage of the particular goods. The notice is only in general terms that the goods shall be subject to the general balance due from the respective owners. If we take it to be a lien upon the general balance due from the consignor, there is no pretence for any lien beyond the carriage of these particular goods. Taking it to be a lien for the general balance due from the consignee, then it can only be a lien subject to the right of the consignor to stop the goods *in transitu* in consequence of the insolvency of the consignee. This case has been compared to the case of the consignment of a bill of lading. To be sure two cases can hardly be stated more dissimilar. A consignee, by a bill of lading, receives what is considered as a kind of negotiable interest and for a valuable consideration: here there is no consideration to the consignor for extending the lien. A consignee of a bill of lading may for a valuable consideration negotiate that instrument. Whence does that arise? From the usage and custom of merchants. Where is the usage and custom respecting the trade of a carrier to authorise this lien? In the former case there is an instrument under the hand of the consignor himself, and the consignee acts as his agent in the disposition of the property: it is an assignment by the consignor himself. The most colourable argument in my mind that has been used upon this occasion is that which was not mentioned till the reply, comparing this case to the case of a creditor of the consignee taking goods in execution upon their passage. It is assumed that the creditor has that right; but if he has it, I still do not think that the cases are similar. Perhaps the consignee himself may intercept the goods in their passage; and indeed I have little doubt, but that if he do intercept them in their passage before the consignor has exercised his right of stopping *in transitu*, and do take



an actual delivery from the carrier before the goods get to the end of their journey, that such a delivery to him will be complete; and I will not say but that his creditors in the case of an execution against him for his goods may not do the same thing. No authorities, however, are cited to prove that they may. But supposing that they may, still I do not think it applies to this case; for the creditor under an execution takes the thing absolutely to sell and dispose of as the consignee himself would have done; but the carrier does not so take it, for he has no absolute property in the goods, but only a lien. What is the nature of the possession of a carrier. He has no absolute right in the property; he has only a lien. Then the question returns, What is the nature of the carrier's lien while the goods are *in transitu*? I conceive his lien cannot, as against the consignee, extend any further than to entitle him to be paid for his carriage of the particular goods, but by the lien the right of the consignor to stop the goods *in transitu* is not defeated. For these several reasons, and for those which have been urged by my Lord and my brothers who have spoken before me, I am perfectly well satisfied that the judgment in this case should be given for the plaintiffs. As to the rejection of the evidence, the only use that could have been made of that evidence would have been to prove that as against the consignee the carrier had a lien.—Judgment for the plaintiffs.

RICHARDSON v. Goss, 1802, 3. BOSANQUET and PULLER, 119.—Trover for goods. This cause was tried before Lord Alvanley, Ch. J. at the *Guildhall* Sittings after last *Michaelmas* Term, when the following facts appeared in evidence. The goods in question were shipped by the plaintiff, who was a dealer in bacon and hams at *Newcastle*, on board the *Formosa*, directed to a person of the name of *Wilson* in *London*, by whom they had been

ordered. On the 1st of *June*, 1801, *Wilson* wrote and sent the following letter to the plaintiff at *Newcastle*. "This serves to acquaint you that from a heavy disappointment I am deprived answering my engagements. It is distressing to say I am under the necessity to refuse my acceptances, the more so as your account is the heaviest I have. This unforeseen accident is caused by the embargo in the *Baltic*. I flatter myself by having time I shall surmount my difficulty; but if that cannot be allowed, I must give every thing I have in satisfying my creditors. I have received the 4 hogsheads per *Neptune*, *Parkinson*, but shall not apply for the 3 hogsheads by the *Formosa*. Little did I think this would have been the case, or I would never have ordered any goods from you. Nevertheless, if I meet with candour and patience, I shall be able to surmount all my difficulties." This letter reached the plaintiff at *Newcastle*, on the 3rd of *June*, and by return of post, viz. the 4th of *June*, the plaintiff wrote to *Wilson*, saying, "If I find you an honest man you shall have every indulgence from me;" but making no mention of the goods on board the *Formosa*. As soon as the arrangement of his concerns would permit, the plaintiff set off from *Newcastle* for *London*, and arrived on the evening of the 7th of *June*. Previous to the letter of the 1st of *June*, viz. on the 22nd of *May*, *Wilson* had directed the defendant, at whose wharf goods were usually landed for him and kept till sent for, to receive the goods coming by the *Formosa*, and had accompanied his directions by an order to the captain of the *Formosa*, in the usual form, to deliver them to the defendant or bearer. *Wilson* was indebted to the defendant to a considerable amount on a former account, as well as for the freight and charges of the goods in question, which arrived at his wharf on the 4th of *June*, and which the defendant, not having been informed by *Wilson* of his letter of the 1st of *June* to the

plaintiff, paid. The plaintiff on his arrival in *London* demanded the goods in question, and tendered to the defendant the freight and charges; but the defendant refused to deliver them up unless upon payment of the general balance due to him from *Wilson*. The jury found a verdict for the plaintiff; but liberty was reserved to the defendant to move to have that verdict set aside and a verdict entered for himself, if the court should think him entitled thereto in point of law.—Lord *Alvanley*, Ch. J. Suppose a wharfinger to have a general authority to receive all goods directed for *A. B.*, and that goods come to his wharf by mistake directed for *A. B.* It is quite clear that the real owner of the goods could not take them away without paying the charges incident to those particular goods: but it is equally clear that the wharfinger could not set up a lien on such goods for a general balance of accounts due from *A. B.* to him. The question therefore is, Whether the contract between the plaintiff and *Wilson* was not completely put an end to before the goods were received? And unless it can be shewn that the goods did not come into the hands of the defendant, as the goods of the plaintiff, it appears to me that the latter will be entitled to recover. If, indeed, the defendant had been induced to advance money or accept bills upon the expectation of the arrival of the goods, he might have acquired a lien upon them to the amount of the credit given upon those specific goods, the party to whom such credit was given having had a right to direct the goods to his wharf at the time when it was given. This was the case of *Hammonds v. Barclay*. But it would be going too far to say, that because *Wilson* omitted to countermand his order when he ceased to have any right over the goods, the defendant is entitled to a lien upon those goods for the general balance due from *Wilson*. But in the present case I am of opinion, that common justice requires that the lien of the de-

defendant should not be extended beyond what was actually advanced by him upon these particular goods: and as the amount of all the charges incident to these goods was tendered by the plaintiff, I think that he is entitled to recover. —*Heath, J.* I am of the same opinion. Here the wharfinger had no right to retain the goods against *Richardson*, who was no creditor, in respect of any thing but what had been laid out upon them: though if *Wilson* had demanded the goods, the wharfinger would have had a right founded on custom to retain for his general balance. In this case no fraud appears, nor any suspicion of fraud, but a mere act of negligence on the part of *Wilson*, who certainly ought to have given notice to the defendant of his having put an end to the contract. The title of *Richardson* was the preferable title; under these circumstances, therefore, the wharfinger has no right to set up any lien against him for the general balance of accounts due from *Wilson*. —*Rooke, J.* I am of the same opinion. The doctrine of general liens is referable to special agreement, as was observed in *Oppenheim v. Russell*; and I think that doctrine is not to be favoured, because all persons who claim under them must have been guilty of neglect in suffering goods, upon which the law had given them a special lien, to go out of their hands without endeavouring to indemnify themselves, by setting up a claim for a general lien. I shall never, unless bound by authority, assent to the doctrine that these general liens are to affect the rights of third persons, not claiming under those from whom the right to the lien is derived. The defendant claims under *Wilson*, and had no more than a bare authority from him to receive the goods, which authority was dated in *May*, when there was no suspicion that *Wilson* was likely to be involved. And though he afterwards forgot to countermand this authority, when he had rescinded his contract with the plaintiff, yet the defendant had nothing more than

a bare authority to receive the goods. I am therefore of opinion that he had no right to set up this general lien against the right paramount of the plaintiff.—*Chambre, J.* If there be any case in which it would be justifiable to strain the law for the purpose of supporting a lien, yet I do not think that there is any reason for doing so in this. In the present case *Wilson* never received the goods: and indeed some days before they came to the hands of the wharfinger he wrote a letter to the consignor, signifying his intention not to receive them, which letter was received by the consignor the day before the goods arrived at the wharf. It has been contended that the transaction is a fraud on the wharfinger: but before fraud can be committed, there must be some right. Now the wharfinger had a mere naked authority: and any disposition made by the person who gave such an authority must put an end to it. It has been argued, that the wharfinger might have extended his credit to *Wilson* upon the assurance of the arrival of the goods: but that is a speculation which the law does not allow; for there can be no lien until possession. On the arrival of the goods the wharfinger is put to some trouble and expense, for which he has a lien upon the proprietor of the goods: but the lien now claimed is an extension of that lien; and if he had had former dealings with *Richardson* he might have set up a general lien against him. The lien, whether general or special, must be against the proprietor, which in the present case was the plaintiff.—Rule discharged.

*PYNE v. ERLE*, 1799, 8. TERM REP. 407.—The plaintiff having recovered a judgment against the defendant for 400*l.* on a bond, charged him in execution in the year 1783, and died in 1797. In this term the defendant moved to be discharged out of custody, his wife having taken out administration to the plaintiff.—*Lawes* now

shewed cause against that rule. First, He said that the letters of administration were void, because the defendant's wife, in taking out administration, had sworn that the plaintiff's effects only amounted to 5*l.*, whereas this alone was a debt of 400*l.* And secondly, he contended, that as the plaintiff's attorney had a lien on the judgment for his costs, the defendant ought not to be discharged out of custody until he was satisfied for his costs. But the court thought there was no foundation for the opposition to the rule. — Lord *Kenyon*, Ch. J. said, If the administration had been granted by an inferior jurisdiction, and there were *bona notabilia* out of that diocese, the administration would have been void. But this administration, having been granted by the Prerogative Court, is good. If, indeed, the letters of administration have been obtained by fraud, they may be hereafter set aside on that ground: but at present it is a legal administration; and that being so, there is an end of this action, the defendant's wife being the legal representative of the plaintiff. On the other point, I do not think that the plaintiff's attorney has any lien on the judgment, so as to prevent the defendant being discharged. — Rule absolute.

HOUGHTON *v.* MATTHEWS, 1803, 3. BOSANQUET and PULLER, 485.—Trover for a quantity of indigo. This cause was tried before Mr. Justice *Rooke*, at the last *Lent* assizes at *Lancaster*, when the following facts appeared in evidence: The defendants, who were brokers, had, on the 3rd of *September*, 1799, sold a parcel of logwood and fustic to *Jackson*, the bankrupt, and on the 11th of the same month, a parcel of indigo, neither of which parcels were paid for at the time of *Jackson's* bankruptcy. The logwood and fustic was the property of a person of the name of *Greatham*, and the indigo of a person of the name of *Dixon*; both these parcels had been put into the

hands of the defendants by the proprietors, to be sold by them as brokers, and both sales were effected in the names of the brokers only, it being their practice to sell in their own name, where the party for whom they sold was indebted to them. At the time of such sales, and when this action was commenced, there was a balance due both from *Greatham* and from *Dixon* to the defendants. Soon after the above sales, *Jackson*, the bankrupt, put into the hands of the defendants the indigo in question to sell, as brokers; no advance being made by them upon the indigo, nor any debt existing between the defendants and *Jackson*, other than what was due to the former for the goods of *Greatham* and *Dixon*, purchased by *Jackson* of the defendants as before mentioned. Indeed the commission to sell the indigo in question was the first time the latter had ever employed the defendants as brokers. While the indigo in question still remained unsold in the hands of the defendants, as brokers, *Jackson* became a bankrupt. Upon this, the plaintiffs, as his assignees, demanded the indigo, and tendered payment of any charges which might have been incurred in respect of that article; the defendants refused to deliver it up, claiming a lien upon it for the debt due from the bankrupt, in consequence of the goods of *Greatham* and *Dixon* sold to him, and which still remained unpaid for. The learned judge was of opinion that the defendants had no lien upon the goods in question, and therefore, under his direction, a verdict was found for the plaintiffs, with leave reserved to the defendants to move to set that verdict aside, and have a nonsuit entered.—*Chambre, J.* The question is, Whether when a broker receives goods to sell for *A.* he is entitled to retain them though unsold, after a tender of all charges due in respect of those goods, on the ground of a lien for the price of other goods sold by him for *B.* to *A.* under a general authority from *B.* to sell, there being no general balance due

from *A.* to the broker, and the broker not having sold the goods of *B.* under a *del credere* commission? I state the question thus, because I conceive that, in the present case, the mere act of the bankrupt buying goods of the defendant did not constitute the relation of principal and factor between them. The demand of the defendant upon the first goods did not arise out of any course of dealing in the relation of principal and factor; but was as foreign to that relation as if it had arisen upon a legacy, or any other species of debt the most remote from that course of dealing. I do not find any authority for saying, that a factor has any general lien in respect of debts which arise prior to the time at which his character of factor commences: and if a right to such a lien is not established by express authority, it does not appear to me to fall within the general principle upon which the liens of factors have been allowed. It seems to me that the liens of factors have been allowed for the convenience of trade, and with a view to encourage factors to advance money upon goods in their possession, or which must come to their hands as factors; but debts which are incurred prior to the existence of the relation of principal and factor, are not contracted upon this principle. And if the lien now contended for were allowed, instead of inducing persons to place goods in the hands of factors, it would operate the contrary way, since it would tend to prevent insolvent persons from employing their creditors as factors, lest the goods entrusted to them should be retained in satisfaction of former debts. If this were the only point in this case, I should be of opinion that the defendants were not entitled to retain: but laying this point out of the question, I still think the debts due from the bankrupt, in respect of the goods sold to him, are not to be considered as due to the defendants, so as to authorize them to set off such debts, in an action brought against them by the bankrupt's assignees, and that the de-



vendors have no property or interest whatever in those debts. I never yet heard of a person being allowed to protect himself, by setting up debts in reality due to other persons; or that a factor, having no demand on his principal, could, by transactions with a third person, create a new interest in himself. In the case of *Drinkwater v. Goodwin*, Lord Mansfield says, "It shall not be in the power of any man, by his election, to vary the rights of two other contending parties." According to this rule, the factor has no right to prejudice the title of his principal. That a factor has a lien for his general balance, is a point too well established to be disputed. The case *Kruger v. Wilcox* proves nothing more. Where a factor is in advance for goods by actual payment, or where he sells under a *del credere* commission, whereby he becomes responsible for the price, there is as little doubt that he has a lien on the price, though he has parted with the possession of the goods. If he acts under a *del credere* commission, he is to be considered as between himself and the vendee, as the sole owner of the goods. There is no doubt of the authority of a factor to sell upon credit, though not particularly authorized by the terms of his commission so to do; but if he so sell without a *del credere* commission, it is well established that he does not become a surety; the debt is due to the owner of the goods only. Many cases have been cited, which do not appear to me to warrant the inferences drawn from them. In *Gonsalez v. Sladen* it is said, that if the factor of a person beyond sea buy or sell goods, he may sue or be sued in his own name; for if he buy, the credit is presumed to be given to him; and if he sell, the promise is presumed to be made to him. But where the principal resides abroad, he is presumed to be ignorant of the circumstances of the party with whom his factor deals, and therefore the whole credit is considered as subsisting between the contracting parties.

The sentence in *Buller's nisi prius*, immediately following the case of *Gonsalez v. Sladen*, was not cited. There it is said, that "a factor's sale does, by the general rule of law, create a contract between the owner and buyer; and therefore if a factor sell for payment at a future day, if the owner give notice to the buyer to pay him, and not the factor, the buyer would not be justified in afterwards paying the factor." The factor, therefore, has no right to consider himself as substantially the creditor of the vendee of the goods; he has no equity in his favour, and the account is really and truly between the vendee and the principal. It is true that Mr. J. *Buller* adds, "yet, perhaps, under some particular circumstances, this rule may not take place, as where the factor sells the goods at his own risk, (*i. e.* is answerable to the owner for the price, though it be never paid), for in such case he is the debtor to the owner, and not the buyer." Neither the case of *Rabone v. Williams*, nor that of *George v. Clagett*, appear to me to have any application to the present. The principle upon which those cases proceeded, is well summed up in *Cullen's* bankrupt laws, viz. that where a party being only an agent, acts ostensibly as the real and sole owner, (as in the case of a factor concealing his principal, or an acting partner his partners), the buyer of goods from him may, in an action by the principal in the one case, or the firm in the other, set off a debt due to him from the factor or acting partner respectively, upon the ground that the parties by their conduct, having enabled their agent to gain credit as the sole owner, and the buyer having *bonâ fide* contracted with him in that character, they cannot recover against the buyer, without allowing him the same advantages and equities in his defence that he would have had against their agent. There is a case of *Garrett v. Cullum, Bull, N. P. p. 42. last Ed.* and which is also cited in *Scott v. Surman, Willes, 405.* which fully proves the doctrine that the

debt of the vendee is not due to the factor. In that case the factor of a person living in *Ireland*, having sold goods to a person living in *London*, without acquainting him with the name of his principal, or acquainting his principal with the name of his vendee, became bankrupt; after which the vendee paid the money to his assignees; the principal then brought an action against the assignees and recovered, it being held that though the vendee was discharged by the payment to the assignees, yet the debt was not in law due to them but to the principal, and therefore did not pass under the assignment. That case is said in *Willes*, to have been cited at *Guildhall*, by Lord Ch. J. *Parker*, with approbation. These cases appear to me to establish, that where a factor has no special claim on the goods, and he has disposed of them, whereby he has lost the advantage arising from possession, the debt is to be considered to all intents as the debt of the principal, and the factor has no lien on the price. My brother *Heywood* mainly relied upon the case of *Drinkwater v. Goodwin*, whereas the court throughout that case evidently proceed on the ground of the factor having given his security for the payment of the goods, and thereby acquired a lien on them in the same way as if he had advanced his money on the goods themselves. The principle upon which that case was decided is very correct; but why did the decision proceed upon that principle, unless with a view to distinguish it from cases circumstanced like that now before the court? It is unnecessary to enter at large into all the positions on this subject, which are laid down in the books; many of which are very clearly stated in *Scott v. Surman*. It has been observed, that though a broker does not act under a *del credere* commission, still he may bring an action in his own name for goods sold by him. This power, however, is incident to the nature of his employment, as also that he should be able to give discharges to those from whom he

receives money in payment of goods sold on account of the persons for whom he acts. But these circumstances do not prove that he has any interest in the goods which pass through his hands. How would this case have stood, if the defendants had never become creditors of *Greatham* and *Dixon*? It has not been argued, that in such case there could have been any lien; and yet how can any right between the defendants and the bankrupt be altered by a subsequent course of dealing between the defendants and third persons? The rights of lien and detention must have existed at the time when the goods of *Greatham* and *Dixon* were sold to the bankrupt, and cannot be varied by the subsequent conduct of *Greatham* and *Dixon* towards the defendants, unless the bankrupt has been privy to their transactions. Under all these circumstances, and finding no authority which warrants the factor in claiming any such lien as is claimed in this case, I must deliver my opinion that the defendants have failed in the defence set up by them, and that as they were fully satisfied all they had a right to demand, the learned Judge was perfectly correct in his direction to the jury.—*Rooke, J.* This question arises in an action of trover, and must be decided by the rules of law. Cases which have been decided by the Lord Chancellor, on the principles of general equity at the hearing of bankrupt's petitions, must not give the rules for our decision in the courts of law. Lord *Hardwicke* very cautiously takes the distinction in two cases, namely *Kruger v. Wilcox*, *Ambt.* 253. and *Ex parte Deeze*, 1 *Atk.* 228. In the first of these cases he says, "whether this was ever allowed in trover at law, where the goods were turned into money, I cannot say, nor can I find any such case. I have no doubt it would be so in this court, if the goods remained in specie, nor do I doubt of its being so where they are turned into money." In the latter case he says, "and here, though there had been no bankruptcy in an action for

these goods, the debt could not have been set off; yet as the clause of mutual credit has been extended, I think it may come within that rule." In the case before the court, there is no doubt that the defendants had a lien on the goods sent to them by *Dixon* and by *Greatham*, for their general balance while the goods remained in their hands, and if they had received the money for these goods, they might have retained it for the balance due to them. But when they parted with the goods they parted with their lien; and if they were at that time creditors of *Dixon* and of *Greatham*, (which was not directly proved at the trial,) they were on the same footing as the other creditors. Having then a claim on the general effects of *Dixon* and *Greatham*, *Jackson*, to whom they had sold some of their goods, sends them goods to sell, and while these goods remained unsold, becomes bankrupt; the defendants claim to retain these goods for a debt due to *Dixon* and to *Greatham*; because if *Jackson*, instead of sending goods to them as factors, to sell for him on his own account, had sent them money to pay for the goods he bought of them, they might have retained the money for debts due to them from the house of *Dixon* or of *Greatham*. The doctrine of liens has already been carried very far, but I cannot find that it has yet been carried so far as to permit a factor to retain for all possible demands which he may choose to make on the goods sent to him. Here the defendants are supposed to have a demand and a right of action against *Dixon* and against *Greatham*, who, for aught we know, are each of them solvent. The defendants are not answerable to them for the value of the goods sold to the bankrupt, nor have they advanced any money on them. The bankrupt is indebted to the house of *Dixon* and of *Greatham*, for the price of the goods sold to him on their account by the defendants. The defendants then are middle men, not answerable to *Dixon* or to *Greatham*,

and have no claim upon the bankrupt in their own right except for the expenses due on the goods he has sent to them, which expenses have been tendered to them. I doubt (but with great deference to my Lord Chief Justice, who has had so much experience in Courts of Equity) how far equity would assist such a claim, since it is not necessary to secure the factors themselves, but is set up only for the benefit of other persons. I question whether the creditors at large of the bankrupt *Jackson*, have not an equitable as well as legal claim, equally well founded with that of *Dixon* and of *Greatham*. This is an attempt, through the means of these defendants, to give the houses of *Dixon* and of *Greatham* a preference above the other creditors. The assignees have made out their case as plaintiffs; the defendants set up this lien by way of defence: it is incumbent on them to make out a clear case; they are not entitled to have presumptions made in their favour; and the Court can only judge from the facts actually proved by them. On the whole I am satisfied that at law, and in this action of trover the defendants cannot support this claim of a lien. My opinion therefore is, that the rule for a new trial should be discharged.—*Heath, J.* I am of the same opinion with my brothers *Rooke* and *Chambre*, who have so fully discussed the principles and authorities relating to the subject that it is unnecessary for me to enter into the matter at length. The defendants claim a right to retain the goods in question as brokers, not in respect of any debt due to themselves upon the goods, but in respect of a debt which they say is due from the bankrupt to them, but which, in truth, is due to *Greatham* and to *Dixon*. That part of the case has been very satisfactorily argued by my two brothers who preceded me. There are two species of liens known to the law, namely particular liens and general liens. Particular liens are where persons claim a right to retain goods in respect of labour or money expended

upon them; and those liens are favoured in law. General liens are claimed in respect of a general balance of account; and these are founded in custom only, and are therefore to be taken strictly. There is no authority to shew that such custom has ever been extended to debts generally; and the opinion of Lord *Hardwicke*, in *Ex parte Deeze*, which is one of the first cases in which a party was allowed to retain for a general balance, seems directly to the contrary. From the report of that case in 1 *Atk.* 229, it appears as if the decision had been founded on the 2 *Geo.* 2. respecting mutual credits; but that report is not correct; for in *Ex parte Ockenden*, 1 *Atk.* 237, Lord *Hardwicke*, speaking of the case *Ex parte Deeze*, says, "there was evidence that it was usual for packers to lend money to clothiers, and the clothes to be a pledge not only for the work done in packing, but for the loan of money likewise." In that case, therefore, a right was claimed to retain for a general balance of accounts; *Deeze* having been a creditor of the bankrupt for money advanced to him as a packer and merchant, antecedent to the time of the particular goods being put into his hands. From the expression of Lord *Hardwicke* also, 1 *Atk.* 229, these goods were in the petitioner's hands as a pledge for some part of his debt, namely, the price of the packing; "and what right has a Court of Equity to say, that if he has another debt due to him from the same person, the goods shall be taken from him without having the whole paid?" we may collect that he did not think the petitioner entitled to retain for the whole, independent of the custom. The case of *Drinkwater v. Goodwin*, proceeded on a special agreement independent of the custom. The agreement was stated and relied on; and Lord *Mansfield* says, "the agreement therefore is, that he shall have a lien." There is no authority therefore for the position, that a factor may retain goods in his hands in respect of all debts

whatsoever ; and there is a rule of law which has not been touched upon in argument, and which appears to me decisive of the contrary, namely, that nothing can fall within the custom of trade but what concerns trade. Collateral obligations therefore, such as money due for rent, are not within the custom which authorizes a factor to retain for a general balance.—Lord *Alvanley*, Ch. J. When this motion was first made, I am inclined to think my brother *Rooke's* direction proper ; but having heard the argument and looked further into the question, I find myself under the necessity of differing from my brothers so far, as to think that a verdict ought not to be entered for the plaintiff on the facts stated in the report. Farther than that however I do not go. I am by no means prepared to say, that a verdict ought to be entered for the defendant ; for I think that if a new trial were granted, some facts might be established which are now equivocal, and which would give rise to a question of so much importance, that I should wish to take more time for consideration before I decided against the defendant's right to a lien. It was not distinctly proved at the trial, that *Greatham* and *Dixon* were indebted to the defendants, but we must suppose that fact capable of proof. If, however, the fact itself would make no difference in the determination of the court, there is no reason for sending the case to a new trial in order to have it found. At present, therefore, I must suppose that the case affords sufficient ground to infer that *Greatham* and *Dixon* were indebted to the defendants. These persons then having put goods into the hands of the defendants, with authority to sell them in their own names, and consequently to bring actions and give receipts for the money ; and the defendants having accordingly executed their commission by selling in their own names, and *Greatham* and *Dixon* being still in their debt, the defendants acquired a right to demand the value of the goods from the persons



to whom they were sold. The cases cited have, I think, decisively proved that point. Nor does it make any difference, whether the goods were sold under a *del credere* commission or not. The only effect of a *del credere* commission, is to make the factor responsible for the value of the goods to his principal. If the factor, without such a commission, sell the goods in his own name, he may bring an action for the value; and if the principal bring the action, the vendee may set off a debt due to him from the factor. The factor, therefore, being authorized to bring an action for the value of the goods, may retain the whole amount in satisfaction of the debt due to him from his principal. We are to consider then, in the first place, what relation was created between these parties, by those circumstances which took place subsequent to the sale of the goods belonging to *Greatham* and *Dixon*; remembering that at the time of that sale, the defendants were the factors of *Greatham* and *Dixon* only, and not of the bankrupt. That subsequent to that period, and while the bankrupt still remained indebted for the goods of *Greatham* and *Dixon*, which he had received from the defendants, he sends the goods in question to the defendants, to be sold by them as his brokers, knowing that he stood indebted to them for the goods of *Greatham* and *Dixon*, though he did not know but that the defendants themselves were the proprietors of the goods, the names of *Greatham* and *Dixon* not having been communicated to him. Consequently the bankrupt must have considered his debt as due to the defendants; and the moment he sent goods to them as brokers, their right of lien attached upon the goods. If the defendants had sold the goods, it is clear that they might have applied the money arising out of the sale in discharge of the debt due from the bankrupt, on account of the goods of *Greatham* and *Dixon*; and how do we know that they did not forbear to sell, because they

considered the goods as a security for that debt? Whatever may be the case with respect to other trades, it is not now denied that a factor has a right to retain for the general balance of his account. If a debt be due from the principal to the factor, antecedent to the time of the particular goods being put into the hands of the latter, he is entitled to retain them as a security. And if a man commence dealing with a factor, to whom he is indebted on bond, I am not prepared to say that the lien of the factor would not attach upon such debt. In the present case, however, the goods of *Greatham* and *Dixon* were sold by the defendants as factors, and the debt therefore arose in the ordinary course of their dealing as factors. The case of *Drinkwater v. Goodwin* was, I admit, the case of a particular contract, but the principle of the decision was, that if a factor become surety for his principal, he has a lien to the amount of the sum for which he becomes surety. The case of *Grove v. Dubois* establishes, that a broker acting under a *del credere* commission, may set off against his principal the amount of losses incurred; and the cases of *George v. Clagett*, and *Rabone v. Williams* shew, that if a factor sell the goods of his principal in his own name, the buyer may set off against the principal a debt due from the factor. It appears to me, therefore, that a factor who sells in his own name, stands in the same situation with respect to lien as if he had a *del credere* commission. I do not wish to be bound by my present opinion, but as the case strikes me, the present defendants are warranted, by the custom of merchants, in claiming a lien upon the goods now sued for. It is contended, that the defendants only set up this lien with a view to protect *Greatham* and *Dixon*. But I cannot assent to a proposition which assumes that *Greatham* and *Dixon* are solvent. The presumption rather is that they are insolvent, since they have not paid the debt due from them to the

defendants; and the question is, Whether the latter are not justified in retaining the goods in their hands, as a security against the insolvency of their debtors? With respect to the authority of the cases which have been cited from the Court of Chancery, it is true that courts of equity, in administering justice, sometimes go further than the courts of law. But it is clear that the Lord Chancellor has no authority to screen goods in the hands of a factor, with a view to distribute them in equity according to a different course from that which prevails at law; and if Lord *Hardwicke* had entertained any doubts upon the rule of law, he would certainly have taken the opinion of some common-law court. I can hardly conceive the case *Ex parte Deeze* to be well reported: for, according to the report, Lord *Hardwicke* seems to suppose that in cases of bankruptcy, if a person has a lien to a certain amount, there is no harm in giving him a lien to the whole amount of his claim. But to such a proposition no lawyer can assent. The other ground of determination supposed to have been stated by his Lordship, namely, the clause of mutual credit, certainly cannot be sustained. The decision therefore must rest upon the ground of lien; and in the subsequent case *Ex parte Ockenden*, Lord *Hardwicke* states the real principle upon which the case *Ex parte Deeze* must have proceeded; for he says "in the case *Ex parte Deeze*, there was evidence that it was usual for packers to retain not only for work done, but for money lent." These cases were followed by some other determinations in equity, which I do not think it necessary to mention, as there are cases at law. In *Green v. Farmer*, 1 *Black.* 652. 4 *Bur.* 2221, Lord *Mansfield* says, "the convenience of commerce and natural justice are on the side of liens, and therefore of late years courts lean that way." He then states, that lien may arise not only from express contract, or where the party has acted as a factor, but that it may

be implied from the usage of trade, or from the manner of dealing between the parties in the particular case. Indeed he considers Lord *Hardwicke* as having decided the case *Ex parte Ockenden* (which at first view seems not so favourable to liens as his opinion in *Ex parte Deaze*) on the special ground that there was no room to imply a lien, from the usage of trade or the particular manner of dealing. The case of *Kruger v. Wilcox* had before established, that if there be a course of dealings and general account between a merchant and a factor, and a balance is due to the factor, he may retain the ship and goods, or produce, for such balance of the general account; it is considered as an interest in the specific things, and they are made articles in the general account. In that case Lord *Hardwicke* speaks only of a foreign factor, but there is no doubt that a home factor is entitled to the same lien, though the *lex mercatoria* seems to found the origin of the custom on the merchant residing abroad. *Kruger v. Wilcox* is recognised in *Foxcroft v. Devonshire*, 2 Bur. 937, and in *Walker v. Birch*, 6 T. R. 262. Lord *Kenyon* considers the factor's right to his lien for a general balance as so long settled, that it ought not to be brought into dispute; he says it is an agreement which the law implies. The opinion indeed of Mr. Justice *Lawrence* in that case, may seem to support the opinion of my brothers; for he says, that the doctrine of lien only applies to cases where the goods have been deposited in the nature of a pledge; that the persons for whom the lien was then claimed, never acted as the brokers of their principal before the transaction in question, and consequently that the goods could not be considered as deposited with the former as a general pledge. The question, however, is, Whether a factor be not that sort of person that all goods which come into his hands are to be considered as clothed with a lien for his general balance? In *Co. Bank. Law.* p. 455, Ed. 1797,

it is laid down, that where one has acted as factor for another, every thing in his hands is construed to be a pledge not only for incidental charges, but as an item of mutual account for the general balance due to him. The only point in difference between my brothers and myself is, Whether this debt due on account of the goods sold for *Greatham* and *Dixon*, be such a debt as can be brought into a mutual account between the defendants and the bankrupt? I am not desirous of favouring liens to so great an extent as has been done by the courts of late; for we know it has been determined, that the members of any trade may, by agreement among themselves, obtain the benefit of that sort of lien to which a factor is entitled by the general law. I am sorry the courts have gone so far. In this case, however, I feel that the defendants are in possession of a principle of law, which has never been denied, and that being commissioned by another to sell goods for him, they acquired a right to retain those goods in satisfaction of any demands which might be due to them from the person who sent the goods. The moment the goods were sent, the relation of principal and factor arose; and when that relation commenced, the right to a general lien attached. I desire not to be considered as giving a positive opinion; but my doubts incline me to think that the court is justified in entering a verdict for the plaintiffs.

—Rule discharged.

*FURLONG v. HOWARD*, 1804, 2. SCHOALES & LAFROY, 115.—It was moved on the part of the plaintiff, that defendant should produce a certain deed, stated to be in his possession.—Mr. *Burne* opposed the motion, on the ground that the deed in question was in the possession of the solicitor for the defendant, who had a lien on it for his costs.—Lord *Chancellor*: Though a solicitor may have a lien on a deed for his costs, yet if his client is bound to

produce it for the benefit of a third person, so also must the solicitor. I know this is not so understood in general; but the common opinion, that the solicitor may withhold it from all parties, in such a case is erroneous. The right is only as between his client and him.

EX PARTE NESBITT, 1805, 2. SCHOALES & LEFROY, 279.—It was moved, on behalf of assignees, to oblige a solicitor to deliver up papers, on which he claimed to have a lien for costs; stating that the papers had come into his hands, not in the cause in which he makes a charge for costs, but in another.—Lord *Chancellor*. If the papers came into his hands in the character of attorney or solicitor, for the purpose of business, though they did not come into his hands in the particular cause in which he makes the demand of costs, he has a lien. It depends on the practice. The practice is, that the attorney should have the lien; and that being once established, he trusts to it, and on the faith of it, makes larger advances for his client in other causes. If, indeed, a tenant for life gives deeds into an attorney's hands, the attorney has no lien on them for his costs against the remainder man: for that would be to enable a tenant for life to charge the remainder man.

BUTLER v. WOOLCOTT, 1805, 2. BOSANQUET & PULLER, 64.—This was an action of trover brought to recover the value of a quantity of butter, which came on to be tried at the sittings after last *Hilary* term before Sir *James Mansfield*, Ch. J., when a verdict was found for the plaintiff for the sum of 17*l.* 12*s.* 6*d.*, subject to the opinion of the court upon the following case:—The plaintiff was a cheesemonger in *London*, and the defendant the proprietor of a public waggon for the carriage and conveyance of goods from *Sherborne* in *Dorsetshire* to *London*.

For some years previous to *June*, 1803, the plaintiff had dealt for butter with a person of the name of *John Ensor*, who was a butter factor and dealer in that commodity residing in *Sherborne*. *Ensor* generally sent butter every week to the plaintiff in *London* by the defendant's waggon, and the tubs and firkins were marked with the letter *B*, (the initial of the plaintiff's surname). A bill of parcels or invoice was also usually sent by *Ensor* of the quantity, with a letter of advice to the plaintiff, upon the production of which to the bookkeeper or other persons employed by the defendant to conduct the business of the waggon in *London*, the butter had always been delivered to the plaintiff. Upon the butter being delivered to the defendant's waggon at *Sherborne*, *Ensor* used to draw bills on the plaintiff for the amount of the goods so sent, which bills were regularly honoured and paid by the plaintiff. On the 15th of *June*, 1803, *Ensor* sent up from *Sherborne* to the plaintiff by the defendant's waggon six firkins of butter, regularly invoiced, and marked with the letter *B.*: and on the 16th of the same month he sent a letter of advice, and the invoice or bill of parcels of the said butters to the plaintiff by the post; and at the same time drew a bill according to their usual and accustomed mode of dealing for 100*l.* at 30 days after date, which included in it the value of the six firkins of butter then sent. The bill was immediately accepted by the plaintiff, and afterwards paid by him when it became due. The goods arrived safe in the defendant's waggon in *London*, and the plaintiff demanded the goods of the defendant's agent or bookkeeper, and produced the bill of parcels and letter of advice, and tendered the money for the carriage, and all other charges on the six firkins; but *Ensor* having become bankrupt before the goods arrived in *London*, and he being indebted to the defendant in 55*l.* for the carriage of other butters to *London*, the defendant's agent, by his

authority, refused to deliver to the plaintiff the butters in question, insisting that he had a right to detain them for the general balance due from *Ensor* to him. It is the established custom and usage for the butter-dealers at *Sherborne*, unless there is some express agreement to the contrary with the buyers of butter, to pay the carriers for the carriage of all butters sent by them to those with whom they deal in *London*. All the former parcels of butter consigned by *Ensor* to the plaintiff, and conveyed by the defendant's waggon to the plaintiff, had been delivered to him on their arrival in *London* on demand, without making any charge whatsoever on the plaintiff for carriage; such charges for carriage being regularly carried to the account of *Ensor*, with whom the defendant kept a running account for that purpose, and no agreement or understanding whatsoever existed between the plaintiff and *Ensor* that the plaintiff was to pay the carriage for the butter, but on the contrary *Ensor*, according to the custom, was to pay it. —The question for the opinion of the court was, Whether, under the circumstances of the goods in question having been paid for by the plaintiff to *Ensor* as before stated, and the plaintiff having afterwards tendered the amount of the charges and carriage of the goods to the defendant, he was entitled to recover in this action;—or, whether the defendant had a right to retain those goods for a former demand contracted with him by *Ensor* for the carriage of other goods?—*Best*, Serjt. being called upon by the court to begin in support of the defendant's right to retain the goods in question against the consignee for his general balance from the consignor, contended, that the right of the carrier to retain against the consignor being now established, (and for which he referred to *Aspinall v. Pickford*, 3. Bos. & Pull. p. 44. n. a.) that right must be in respect of the goods put into his hands by the consignor, and must arise the instant the goods come into



his hands, and previous to any rights of the consignee: that the rights of the consignee and the carrier being derived from the same source, and the carrier's right being accompanied by actual possession, the latter ought not to be deprived of his advantage without payment of the balance due to him from the consignor. He observed, that the case of *Oppenheim v. Russell*, 3. Bos. & Pull. 48, was mainly distinguishable from the present, because it was decided on the ground of the consignor's right to stop *in transitu* being prior and paramount to the carrier's right to retain as against the consignee.——But the court (without hearing *Shepherd*, Serjt. *e contra*) were clearly of opinion, that the defendant's claim to retain for the debt of the consignor could not be supported as against the consignee, whose property the goods were from the moment of delivery to the carrier.——Judgment for the plaintiff.

**RUSHFORTH v. HADFIELD**, 1805, 6. EAST, 519.—This was an action of trover to recover the value of a parcel of goods belonging to the bankrupts before their bankruptcy, and sent on their account to be carried by the defendants, common carriers, from *Ellen* and to *London*, and which were detained by the defendants after tender of, and refusal by them to accept, the price of the carriage of such goods until a balance of 78*l.* 15*s.* 7*d.* due to them from the bankrupts for the carriage of other goods at other times was paid. And the question was, Whether the defendants, as common carriers, had a lien on the goods for their general balance. At the trial before *Graham*, B. at the last assizes at *York*, the defendants' counsel offered evidence to shew that by the usage of trade throughout the realm common carriers had a right to retain particular goods belonging to a party for their general balance due from the same party for the carriage of other goods belonging to him.——On the part of the plaintiffs it was

objected, that this evidence did not prove a general usage of the trade: but the learned judge thought that, being uncontradicted, it admitted of that conclusion; and therefore he directed the jury, that if they found that such was the general undisputed usage, it established the right of the carriers; and they thereupon found a verdict for the defendants; which was moved to be set aside in the last term as a verdict against law and evidence.—Lord *Ellenborough*, Ch. J. There was no sufficient evidence on which the jury could find any such general usage as would warrant the conclusion of an agreement between the parties to adopt it. The lien claimed by the carriers for their general balance is not founded in the common law; for by the custom of the realm a common carrier is bound to carry the goods of the subject for a reasonable reward *to be therefore paid*, by force of which he has a lien only for the carriage price of the particular goods. Then what proof is there of any further lien by usage? I will not say that there may not be sufficient evidence of such a general usage for the carrier to let out of his hands the particular parcel on which his common law lien attaches, without receiving the carriage price of it at the time, upon a general agreement, of which such usage would be evidence, that he may retain any other parcel belonging to the same party for the whole of his demand: but such a general usage ought to be proved by stronger evidence than was offered in this case, especially as it trenches upon the common law right of the subject. But if there be a general usage of trade to deal with common carriers in this way, all persons dealing in the trade are supposed to contract with them upon the footing of the general practice, adopting the general lien into their particular contract. The case, however, does not appear to have gone to the jury on this view of it. There had been previous dealing between these parties, and there might have been

evidence to shew, if such had been really the case, that it was understood between them that the carriers were to have a lien on any parcel of goods in their hands for the carriage price of those which had been antecedently delivered: but that was not resorted to, but it was left to the jury as a case turning on the general usage of carriers throughout the realm to have a lien for their general balance, without any sufficient evidence before them to warrant them in drawing so extensive a conclusion. The oldest instance which could be particularized was not above five years ago, and but one instance, and that only two years ago, of the exercise of the claim to any considerable amount, so as to make it worth while to resist it. To justify however so extensive a claim upon the ground of general usage, there ought to be evidence of instances more ancient, more numerous, and more important.—*Grose, J.* I should object to making a precedent in a case of this sort, where a general conclusion is to be drawn from such insufficient premises. A carrier may have a lien either at common law for the carriage of the particular goods; upon which there is no question; or it may arise out of the usage of trade; or by a particular contract between the parties concerned. If it could be claimed by the general usage of trade, I should rather have thought that it should have been coeval with the common law liability of the carrier: but at any rate there was no evidence here sufficient to warrant the jury in finding any such general usage of trade. And as to any lien in respect of a particular contract, it was not left to the jury on that ground.—*Lawrence, J.* I agree that there ought to be a new trial. Common carriers are every day attempting to alter the situation in which they have been placed by the law. At common law they are bound to receive and carry the goods of the subject for a reasonable reward, to take due

care of them in their passage, and to deliver them in the same condition as when they were received: but they are not bound to deliver them without being paid for the carriage of the particular article, and therefore they have a lien to that extent. Of late years, however, they have been continually attempting to alter their general character by special notices on the one hand to diminish their liability, and on the other hand, by extending their lien. But what evidence have we in this case to say that their common law situation is altered? To do that, it must be shewn that both parties have consented to the alteration: the carrier cannot alter his situation by his own act alone. It is said that a general lien is convenient to the parties concerned: I do not say that it may not be so; but it must arise out of the contract of the parties. It may be convenient enough for the customer to say, that in consideration that you, the carrier, will give up your right to stop each particular parcel of goods for the price of the carriage, I will agree that you may stop any one parcel of my goods for the carriage price of all together. But still this must be by contract between them; and usage of trade is evidence of such a contract. And where such a usage is general, and has been long established so as to afford a presumption of its being commonly known, it is fair to conclude that the particular parties contracted with reference to it, then if in this case there had been evidence of a usage so uniform and frequent as to warrant an inference that the parties contracted with reference to it, it should have been left to the jury to infer that it was part of their contract.—*Le Blanc, J.* I doubt whether the jury had this case presented to them in the true light in which by law it should have been; for it was left to them to find for the defendants upon the bare ground of there being evidence of a general usage amongst

carriers to retain for their general balance ; but no usage of carriers would be sufficient to bind other parties, unless it were so general as to furnish an inference that the party who dealt with a carrier had knowledge of it, and so to warrant a conclusion that he contracted with the carrier on that ground. General liens are a great inconvenience to the generality of traders, because they give a particular advantage to certain individuals who claim to themselves a special privilege against the body at large of the creditors, instead of coming in with them for an equal share of the insolvent's estate. All these general liens infringe upon the system of the bankrupt laws, the object of which is to distribute the debtor's estate proportionably amongst all the creditors, and they ought not to be encouraged. But I do not mean to say that a usage in trade may not be so general and well established as to induce a jury to believe that the parties acted upon it in their particular agreement; and I cannot say that such an agreement would not be good in law, although a carrier might have no right to refuse carrying goods for another without an agreement that he should have a lien for his general balance; for that would be contrary to the obligation which the law has imposed on him. The instances of detainer by carriers for their general balance which were proved at the trial were very few and recent with a view to found so extensive a claim; and the instance where goods of the value of 10,000*l.* were detained for 130*l.* does not appear to me to assist the claim; for the parties would naturally rather pay 130*l.*, the amount of the balance due to the carrier, than have goods of such great value detained from them till the question were decided at law. Without saying, therefore, that there may not be such a usage as that insisted on, I am clearly of opinion that there should be a new trial in order to have the case submitted to the jury.

on its true ground, which it does not appear to have been upon the last trial.—Rule absolute.

HANSON v. MEYER, 1805, 6. EAST, 614.—Trove to recover 33 cwt. 1 qr. 21 lb. of starch.—A verdict for the defendant. The court ordered a case as follows: The plaintiffs are assignees of *J. Wallace* and *W. Hawes*, under a commission of bankrupt issued against them. The defendant is a merchant in *London*. In *January*, 1801, the bankrupts employed *Wright*, their broker, to purchase of the defendant a quantity of starch, about four tons, belonging to the defendant, and which was then lying in the *Bull Porter's* warehouse in *Seething-lane*; and *Wright* accordingly purchased the starch of the defendant at 6*l.* per cwt., and sent to the bankrupts, his principals, the following note: "Dear Sirs, I have bought that small parcel of starch which you saw of Mr. *James Meyer* for your account, 6*l.* per cwt. by bill at 2 months; 14 days for delivery from the 14th instant." "Jan. 15th, 1801. Yours, &c. *T. Wright*." The starch lay at the *Bull Porter's*. The broker purchased for the bankrupts all *Meyer's* starch that lay there, more or less, whatever it was, at 6*l.* per hundred weight: it was in papers: the weight was to be afterwards ascertained at the price aforesaid. The mode of delivery is as follows: the seller gives the buyer a note addressed to the warehouse-keeper, to weigh and deliver the goods to the buyer. This note is taken to the warehouse-keeper, and is his authority to weigh and deliver the goods to the vendee. The following note was given by the defendant: "To the *Bull Porter's*, *Seething-lane*." "Please to weigh and deliver to Messrs. *Wallace* and *Hawes* all my starch." "Jan. 17th, 1801. Per *James Meyer*, *William Elliott*." This order was lodged by the bankrupts at the *Bull Porter's* warehouse.

on the 21st of *January*, 1801, on which day the bankrupts required the *Bull Porters* to weigh and deliver to them 540 papers of the starch, which weighed

		Cwt.	qr.	lb.
		21	1	6
And on the 31st Jan.	250	9	1	20
And on the 2d Feb.	400	15	1	4
		<hr/>		
	1190	46	0	12

At which respective times the *Bull Porters*, in consequence of their order, weighed and delivered the same to the bankrupts, who immediately removed the same: the residue thereof, being 33 cwt. 1 qr. 21 lb. remained at the *Bull Porters'* warehouse till the failure of *Wallace* and *Hawes*. The above quantities of starch continued at the *Bull Porters'* warehouse in the name and at the expense of the defendant till they were weighed and delivered: and the residue also afterwards continued there in like manner unweighed, in his name, and charged to his expense. On the 8th of February, 1801, *Wallace* and *Hawes* became bankrupts. It was admitted that the defendant, after the bankruptcy, took away the remainder of the starch that had not been so weighed. The question for the opinion of the court was, Whether the defendant were entitled to the above verdict? If the court should be of opinion that he was, then the verdict was to stand: if not, then a new trial was to be granted upon such terms as the court should direct.—Lord *Ellenborough*, Ch. J. now delivered judgment. By the terms of the bargain formed by the broker of the bankrupts on their behalf, two things, in the nature of conditions or preliminary acts on their part, necessarily preceded the absolute vesting in them of the property contracted for; the first of them is one which does so according to the generally received rule of law in contracts of sale, viz. the *payment* of the agreed price or consideration for the sale. The second, which is the act of *weighing*

does so in consequence of the particular terms of this contract, by which the price is made to depend upon the weight. The weight, therefore, must be ascertained in order that the price may be known and paid: and unless the weighing precede the delivery, it can never, for these purposes, effectually take place at all. In this case a partial weighing and delivery of several quantities of the starch contracted for had taken place; the remainder of it was unweighed and undelivered; and of course no such bill of two months for the price so depending on the weight could yet be given. The question is, What is the legal effect of such part-delivery of the starch on the right of property in the undelivered residue thereof? On the part of the plaintiffs it is contended, that a delivery of part of an entire quantity of goods contracted for is a virtual delivery of the whole, so as to vest in the vendee the entire property in the whole; although the price for the same should not have been paid. This proposition was denied, on the part of the defendant; and many authorities have been cited on both sides. But, without deciding at present what might be the legal effect of such part-delivery in a case where the payment of price was the only act necessary to be performed in order to vest the property; in this case, another act, it will be remembered, was necessary to precede both payment of price and delivery of the goods bargained for, viz. weighing. This preliminary act of weighing it certainly never was in the contemplation of the sellers to waive in respect of any part of the commodity contracted for. The order stated in the case from the defendant to the *Bull Porters*, his agents, is, to weigh and deliver all his starch. Till it was weighed, they, as his agents, were not authorized to deliver it: still less were the buyers themselves, or the present plaintiffs, their assignees, authorized to take it by their own act from the *Bull Porters'* warehouse: and if they could not so take it, neither



can they maintain this action of trover founded on such a supposed right to take, or, in other words, founded on such a supposed right of property in the subject-matter of this action. If any thing remains to be done on the part of the seller, as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer; and of course this action, which is accommodated to and depends upon such supposed perfect right of property, is not maintainable. The action failing, therefore, on this ground, it is unnecessary to consider what would have been the effect of non-payment of price on the right to the undelivered residue of the starch, if the case had stood merely on that ground, as it did in the case of *Hammond and Others* against *Anderson*, 1. *New Rep.* 69.; where the bacon sold in that case was sold for a certain fixed price, and where the weighing, mentioned in that case, was merely for the buyer's own satisfaction, and formed no ingredient in the contract between him and the seller; though it formed a very important circumstance in the case, being an unequivocal act of possession and ownership as to the whole quantity sold on the part of the buyer. In like manner as the taking 800 bushels of wheat out of the whole quantity sold, and then on board the ship, was holden to be in the case of *Slubey v. Heywood*, 2. *H. Bl.* 504. Without, therefore, touching the question which has been the main subject of argument in this case, and upon which my opinion at nisi prius principally turned, and without in any degree questioning the authority of the above mentioned two cases from the Common Pleas, this verdict may be sustained, on the ground that the weighing which was indispensably necessary to precede the delivery of the goods, inasmuch as it was necessary to ascertain the price to be paid for them, had not been performed at the time when the action was brought. The verdict there-

fore must stand, and judgment be entered for the defendant.

**M'COMBIE v. DAVIES, 1805, 7. EAST, 5.**—This action of trover for tobacco having gone to a second trial, in consequence of the opinion of the court delivered in *Trinity* term last, when it was considered that the defendant's taking an assignment of the tobacco in the king's warehouse by way of pledge from one *Coddan*, a broker, who had purchased it there in his own name for his principal, the plaintiff, (after which assignment the tobacco stood in the defendant's name in the warehouse, and could only be taken out by his authority,) and the defendant's refusing to deliver it to the plaintiff after notice and demand by him, amounted to a conversion. The defence set up at the second trial was, that the plaintiff being indebted to *Coddan*, his broker, in 30*l.* on the balance of his account; and he having a lien upon the tobacco to that amount while it continued in his name and possession, the defendant who claimed by assignment from *Coddan* for a valuable consideration, stood in his place, and was entitled to retain the tobacco for that sum; and therefore that the plaintiff not having tendered the 30*l.* ought to be nonsuited. Lord *Ellenborough*, Ch. J., however, being of opinion that the lien was personal, and could not be transferred by the tortious act of the broker pledging the goods of his principal, the plaintiff recovered a verdict for the value of the tobacco.—The *Solicitor-General* now moved to set aside the verdict, and either to enter a nonsuit or have a new trial; upon the ground that the defendant, who stood in the place of *Coddan*, and was entitled to avail himself of all the rights which *Coddan* had against his principal, could not have the goods taken out of his hands by the principal without receiving the amount of *Coddan's* claim upon them. And in answer to the case of *Daubigny v.*

*Duval*, (which was suggested as establishing a contrary doctrine) he observed that Lord *Kenyon* was of opinion at the trial, that the principal could not recover his goods from the pawnee, to whom they had been pledged by the factor, without tendering to the pawnee the sum advanced by him, which was within the amount of the factor's lien upon the goods for his general balance; and that his lordship seemed to retain that opinion when the case was moved in court, though the rest of the bench differed from him.—But Lord *Ellenborough*, Ch. J. said, that nothing could be clearer than that liens were personal, and could not be transferred to third persons by any *tortious* pledge of the principal's goods. That whether or not a lien might follow goods in the hands of a third person to whom it was delivered over by the party having the lien, purporting to transfer his right of lien to the other, as his servant, and in his name, and as a continuance in effect of his own possession; yet it was quite clear that a lien could not be transferred by the *tortious* act of a broker *pledging* the goods of his principal, which he had no authority to do. That in *Daubigny v. Duval*, though Lord *Kenyon* was at first of opinion that there ought to have been a tender to the pawnee of the sum for which the goods had been pledged by the factor, within the extent of his lien, in order to entitle the plaintiff to recover; yet, after the rest of the court had expressed a different opinion, on which he at that time only stated his doubts, he appears in the subsequent case of *Sweet and another, Assignees of Gard v. Pym*, to have fully acceded to their opinion; for he there states, that “the right of lien has never been carried further than while the goods continue in the possession of the party claiming it.” And afterwards he says, “In the case of *Kinloch v. Craig*, where I had the misfortune to differ from my brethren, it was strongly insisted that the right of

lien extended beyond the time of actual possession: but the contrary was ruled by this court, and afterwards in the House of Lords." His Lordship then, after consulting with the other judges, declared that the rest of the court coincided with him in opinion, that no lien was transferred by the pledge of the broker in this case: and added, that he would have it fully understood that his observations were applied to a *tortious* transfer of the goods of the principal, by the broker undertaking to *pledge* them *as his own*; and not to the case of one who intending to give a security to another to the extent of his lien, delivers over the actual possession of goods, on which he has the lien, to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him; in which case he might preserve the lien.—Rule refused.

RUSHFORTH v. HADFIELD, 1806, 7, EAST, 224.—This cause was again tried at the last assizes at York, before *Chambre, J.*, when the defendants' book-keepers in London, at *Stamford*, and at *Huddersfield* swore to their practice to retain goods for their general balance, and particularized one instance in *December, 1799*, where an action was brought, which being referred, was decided on another point: a second in *May, 1800*, where there was no bankruptcy: a third in *May, 1803*, where the bankrupt's assignee demanded the goods, but afterwards paid the balance: a fourth and a fifth in the same year, when the individuals paid the balance, but no bankruptcy intervened: and a sixth instance of the like sort as the last in 1804. In addition to these, *Welch*, a carrier from *Manchester* and *Leeds*, deposed to an instance of retention of goods for the general balance three years back, where a bankruptcy intervened, and the assignees disputed the payment at first, but afterwards paid the balance; and to two

other instances of goods sent to *Glasgow*; one where the carriage of the particular goods was 3*l.* and the general balance 20*l.*; another where the carriage was a few shillings, and the general balance 8*l.*; in both instances bankruptcies intervened, and the assignees paid the general balance. *Hunley*, a *Northallerton* carrier, spoke to two instances of retainer of goods 12 and 13 years ago, till the individuals paid the general balance; but neither were bankrupts. The book-keeper of *Pickford*, a carrier from *London* to *Liverpool*, particularized an instance of retaining for the general balance in 1792, where the vendee became bankrupt; but there the vendor stopped in transitu, and he paid the general balance at the end of two months: a second similar instance in the same year: a third instance in 1795, where the senders became bankrupts, and their general balance was paid by the vendees: a fourth in 1795, where the goods of an individual, not bankrupt, were detained several years; but no account how the matter was finally settled: and two other like instances in 1794 and 1795. And *Clark*, a *Leicester* carrier, also mentioned two instances, one in 1775, the other afterwards, of retaining the goods of solvent individuals till they paid their general balance. All these carriers, who had followed their occupation from 20 to 30 years and upwards, deposed generally to their custom of retaining goods for their general balance in other instances as well as in those particularized. It was left to the jury to decide whether the usage were so general as to warrant them in presuming that the bankrupts knew it, and understood that they were contracting with the defendants in conformity to it; in which case they were to find for the defendants: otherwise they were told, that the general rule of law would entitle the plaintiffs to a verdict. On this direction the jury found for the plaintiffs; which was moved to be set aside at last *Michaelmas* term, as a verdict against all the evi-

dence.—Lord *Ellenborough*, Ch. J. It is too much to say that there has been a general acquiescence in this claim of the carriers since 1775, merely because there was a particular instance of it at that time. Other instances were only about 10 or 12 years back, and several of them of very recent date. The question, however, results to this, What was the particular contract of these parties? And as the evidence is silent as to any express agreement between them, it must be collected either from the mode of dealing before practised between the same parties, or from the general dealings of other persons engaged in the same employment, of such notoriety as that they might fairly be presumed to be known to the bankrupt at the time of his dealing with the defendants, from whence the inference was to be drawn that these parties dealt upon the same footing as all others did, with reference to the known usage of the trade. But at least it must be admitted, that the claim now set up by the carriers is against the general law of the land, and the proof of it is, therefore, to be regarded with jealousy. In many cases it would happen that parties would be glad to pay small sums due for the carriage of former goods, rather than incur the risk of a great loss by the detention of goods of value. Much of the evidence is of that description. Other instances again were in the case of solvent persons, who were at all events liable to answer for their general balance. And little or no stress could be laid on some of the more recent instances not brought home to the knowledge of the bankrupt at the time. Most of the evidence, therefore, is open to observation. If, indeed, there had been evidence of prior dealings between these parties upon the footing of such an extended lien, that would have furnished good evidence for the jury to have found that they continued to deal upon the same terms. But the question for the jury here was, whether the evidence of a usage for the carriers to retain

for their balance were so general as that the bankrupt must be taken to have known and acted upon it? And they have in effect found either that the bankrupt knew of no such usage as that which was given in evidence, or knowing, did not adopt it. And growing liens are always to be looked at with jealousy, and require stronger proof. They are encroachments upon the common law. If they are encouraged, the practice will be continually extending to other traders and other matters. The farrier will be claiming a lien upon a horse sent to him to be shod. Carriages and other things which require frequent repair will be detained on the same claim; and there is no saying where it is to stop. It is not for the convenience of the public that these liens should be extended further than they are already established by law. But if any particular inconvenience arise in the course of trade, the parties may, if they think proper, stipulate with their customers for the introduction of such a lien into their dealings. But in the absence of any evidence of that sort to affect the bankrupt, I think the jury have done right in negating the lien claimed by the defendants on the score of general usage.

—*Grose, J.* This lien is attempted to be set up by the defendants, not upon the ground of any particular contract or previous transactions between them and the bankrupt, but on the ground of previous transactions between them and other parties, and between other carriers and their customers. And it is admitted that the question upon this evidence was properly left to the jury, that they might find a verdict for the defendants, if the usage for the carriers to retain for their balance of account were so general as that they must conclude that these parties contracted with the knowledge and adoption of such usage. The jury have found in the negative. And I take it to be sound law, that no such lien can exist except by the contract of the parties expressed or implied.—*Lawrence,*

J. The most which can be said on the part of the defendants is, that there was evidence which might have warranted the jury to find the other way; but it was for them to decide. This is a point which the carriers need not be so solicitous to establish. It is agreed that they have a lien at common law for the carriage price of each particular article. If, then, it be not convenient for the consignee to pay for the carriage of the specific goods at the time of delivery, it is very easy for the carriers to stipulate that they shall have a lien for their balance upon any other goods which they may thereafter carry for him. It is not fit to encourage persons to set up liens contrary to law. The carriers' convenience certainly does not require any extension of the law; for they have already a lien for the carriage price of the particular goods, and if they choose voluntarily to part with that, without such a stipulation as I have mentioned, there is no reason for giving them a more extensive lien in the place of that which they were entitled to. I should not be sorry, therefore, if it were found generally that they have no such lien as that now claimed upon the ground of general usage.—*Le Blanco, J.* This is a case where a jury might well be jealous of a general lien attempted to be set up against the policy of the common law, which has given to carriers only a lien for the carriage price of the particular goods. The party, therefore, who sets up such a claim ought to make out a very strong case. But, upon weighing the evidence which was given at the trial, I do not think that this is a case in which the court are called upon to hold out any encouragement to the claim set up, by overturning what the jury have done, after having the whole matter properly submitted to them.—*Rule discharged.*

TAYLOR v. POPHAM, 1806, 13. VESEY, 59.—A petition, presented by the solicitors of *Robert Paris Tay-*



lor, deceased, stated various proceedings in these suits originally instituted in the years 1777 and 1778, upon the affairs of *Peter Taylor*, deceased, the father of *Robert Paris Taylor*; in the course of which, by the exertions of the petitioners, as solicitors of *Robert Paris Taylor*, a considerable demand on his behalf was established against the estate of his father on account of various dealings between them in the *German war* of 1757; and by an order, dated 1st of *August*, 1791, an appropriation was made out of the assets of *Peter Taylor* to answer various sums reported due to *Robert Paris Taylor*; the amount of which was directed to be laid out in bank 3 *per cent.* annuities, and placed to the account of *Robert Paris Taylor*: but a claim having been made by the executors of Lord *Holland* of 28,185*l.* 9*s.* 5*d.* as due from *Robert Paris Taylor* to the estate of Lord *Holland*, for which, they contended, *Peter Taylor's* estate was liable, in respect of bonds given by him to the late Lord *Holland*, as surety for *Robert Paris Taylor*, under which bonds judgments had been recovered, it was declared by the order of 1791, that what should be so placed to the account of *Robert Paris Taylor* was to be considered as a security to answer the debt due to Lord *Holland* from the estate of *Peter Taylor*. That debt was ascertained by the master's report at 16,612*l.* 19*s.* 3*d.*—The master's report, dated the 1st of *April*, 1792, stated, that he had taxed the costs of all the parties, including those of *Robert Paris Taylor*. He died in 1792.—By another order, dated the 19th of *July*, 1799, it was ordered, that the sum of 14,990*l.* 4*s.* 4*d.* bank 3 *per cent.* annuities, being the amount of the appropriations directed by the former order to the account of *Robert Paris Taylor*, should be placed to the account of the real estate of *Peter Taylor*; and that the value thereof should be taken in part satisfaction of the debt due to the estate of Lord *Holland*. In *July*, 1801, the far-

ther sum of 245*l.* 12*s.* 9*d.* which had been since got in, was paid into the bank to the account of *Robert Paris Taylor*, and laid out in 385*l.* 6*s.* 3*d.* 3 per cent. annuities:—The prayer of the petition was, that the sum of 385*l.* 6*s.* 3*d.* bank annuities may be sold; and that the proceeds, together with the sum of 34*l.* 13*s.* 6*d.* cash, in the same account, may be paid to the petitioners, in part satisfaction of the sum of 331*l.* 9*s.* 4*d.* the amount of their costs, as taxed under the order of 1791; and that the residue of their costs may be raised and paid out of the 3 per cent. annuities, standing to the account of the real estate of *Peter Taylor*, or any other fund.—Mr. *Perceval* and Mr. *Hart*, in support of the petition, contended for the solicitor's lien for the costs; insisting, that, except in the instance of a creditor of the solicitor, there is no case in which taxed costs are not directed to be paid to the solicitor.—Mr. *Richards*, for the executors of *Peter Taylor*, resisted the petition; insisting, that under the circumstances the whole fund, recovered by the estate of *Robert Paris Taylor* against the assets of his father, should go to reimburse those assets on account of Lord *Holland's* demand, without any deduction for the costs.—The Lord Chancellor. The subject of this petition is of great and general importance. The lien of an attorney for his costs, as between him and his client, cannot be disputed. If an attorney, employed to sue, recovers 500*l.* and is entitled to tax the costs, and the client, being a debtor to the defendant in that action to a greater amount than the sum recovered, did not plead a set off, but afterwards brings an action, and recovers a greater sum, that would not deprive the defendant in that action of his right to costs in the other. The attorney undertakes the suit upon the personal credit of the client; which has a good effect in preventing vexatious suits; as the attorney, unless he sees a probability of success, will not encourage the client. But the re-

sult being, that the client is entitled to costs, it is admitted; they are the costs not of the client, but of the attorney; the effect of his lien; of which he is not to be deprived, unless satisfied by other means. The answer to that is, that it is true, if *Robert Paris Taylor* was entitled to the costs, the attorney had a lien: but they were not the property of *Robert Paris Taylor*; as, though he had recovered a demand from the executors of his father, yet by the claim of *Lord Holland's* estate before the master against the assets of the father, as having been surety for the son, the balance as between them was turned the other way; the plaintiff in the action, in which these petitioners were the attorneys, being suddenly converted into a debtor. If such a rule is adopted in equity, it will be attended with extreme hazard to attorneys. My opinion is, that in this case the attorney is entitled to his costs; and the orders that have been made will bear that construction. They are the costs of the plaintiff in the first instance. *Lord Thurlow* and *Lord Rosslyn* could not know how the account stood with the attorney. The client might have advanced money to him. The lien of the attorney must depend upon the account between them; which the court had not then investigated. The prayer of this petition must therefore be granted.

*NORRIS v. WILKINSON*, 1806, 12. VESBY, Jun. 192.—The bill was filed by creditors of *James Wilkinson*, a bankrupt, and his deceased father *Matthew Wilkinson*; who had carried on business in partnership as dyers; claiming the benefit of a security upon real estates, by a deposit of the title-deeds under these circumstances. *James Thompson* by his deposition stated, that in May, 1803, he was employed as an attorney by the plaintiffs, on their own account, and as agents for *Mackintosh and Co.* in *America*, to obtain security from the *Wilkinsons* for

debts of above 300*l.* due to *Norris* and Co. and above 1000*l.* due to *Mackintosh* and Co. for articles supplied to the *Wilkinsons* in their trade; with directions, if neither payment nor the security could be obtained, to send for writs by the post of that day; that he went to *Leeds*, where the *Wilkinsons* lived, with a letter, requiring the security for the said debts, then due, and any other debts, which might become due to the plaintiffs, upon their estates at *Leeds*; proposing, that *Matthew Wilkinson* should have power reserved by such security to raise 1500*l.*, to be preferred to the plaintiff's security. *James Wilkinson*, coming to the deponent at the inn; represented, that his father was much indisposed, and could not be seen, and took the letter away to consult his father: the deponent observing, that, if his father was inclined to give the security required, the deponent would want the title-deeds of the estate. *James Wilkinson* soon returned, bringing with him, and delivering to the deponent, the title-deeds and a plan of the estate; at the same time saying, that, as the balances due to the plaintiff *Norris*, as agent for the one house, and as partner in the other, were so very considerable, it was only right he should be made easy; and that *Matthew Wilkinson* desired the deponent to prepare such security as *Norris* had required; and added, that it would have been more convenient for his father to have raised 1500*l.* upon a mortgage of the premises previous to giving *Norris* the security: but, if he could not wait, a power must be reserved for that purpose, to have priority of the security to the plaintiffs. The deeds and plan were left in the custody of the deponent by *James Wilkinson*, for the express purpose of enabling the deponent to prepare the security; and he told *Wilkinson*, that, when securities of that nature were given, it was usual that the title-deeds should be left with the person to whom the security was given; and therefore he should give them into

the hands of *Norris*, to be kept with the intended mortgage; to which *James Wilkinson* made no objection; and the deponent accordingly took them away. The deponent does not recollect *James Wilkinson* saying in terms, that he or his father did agree to the deposit of the deeds as a security: but it was perfectly understood between the deponent and *James Wilkinson*, previous to the latter going to consult his father, that, in case he agreed to give the security required, *Norris* would expect to have the possession of the original title-deeds, as well as the proposed security; and the deponent understood, *James Wilkinson* brought them for that purpose, and as instructions to prepare the deeds as a security from. The deponent farther stated, that in *July*, 1808, and about a week before the death of *Matthew Wilkinson*, the deponent offered to *James Wilkinson*, to be executed by him and his father, a conveyance, to secure the several debts then due, and which might become due from the *Wilkinsons* to the respective firms of the plaintiffs, in respect of articles to be sold in the way of their trade. *James Wilkinson* having expressed his approbation of the deed, and appointed two o'clock for the execution, took it away for the purpose of having it looked over by his attorney; and returned at the time appointed for the execution without it; saying, his father was so extremely and alarmingly ill, that he could not trouble him on the subject of the security at that time; but requesting the deponent to inform *Norris* he might make himself perfectly easy; for, if his father recovered, he (*James Wilkinson*) was sure his father would execute the same deeds of security; and he (*James Wilkinson*) would bring them over to *Norris* himself, without loss of time; and in case of his father's death, he (*James*) would immediately give *Norris* the security required, in order to make him easy.—The death of *Matthew Wilkinson* following immediately, the deed was not executed.—

The defendant, *James Wilkinson*, by his answer and depositions, represented the plan; proposed upon *Norris's* application for payment, thus; that *Matthew Wilkinson* should raise 1500*l.* by way of mortgage; *Norris* undertaking to assist in procuring that sum: but, that failing, *Norris* proposed, that, if that sum could not be procured elsewhere, a mortgage security should be prepared to him or his principals for that sum; and that the money, actually due to the plaintiffs according to the usual course of the trade, should be deducted; with a proviso, to enable *Wilkinson* to raise 1500*l.* elsewhere. *Matthew Wilkinson* agreed to that proposal, if he could not procure the money elsewhere. The letter delivered by *Thompson* in *May* from *Norris*, stated, that he had not procured the loan; and sent *Thompson* to receive instructions for the proposed mortgage, according to the answer: the deposition stating only, that the latter required payment of the sums then due. Only part of the debts claimed were then due, the goods having been supplied upon a twelvemonth's credit. *Thompson* said, it would be necessary for him to see the title-deeds, to know whether the title was good; and to extract some particulars to enable him to prepare the security. *Matthew Wilkinson*, being informed of this by the defendant, strongly objected to parting with the deeds out of his own hands: but at length the defendant prevailed upon him to consent to *Thompson's* seeing them; and he delivered them to the defendant, with a strict charge to bring them back to him after *Thompson* had extracted the particulars he wanted. After *Thompson* had looked at the deeds, he for the first time said, he must take them with him; to which *Wilkinson* objecting, and mentioning the charge he received from his father, *Thompson* appeared much offended; declaring, that *Norris* and he were incapable of taking any advantage; and the defendant, from his conduct, and under the idea that he wanted the deeds

merely as instructions, as he had intimated, and upon his representation, that the person lending the money would want to see the deeds, was prevailed on to permit him to take them with him; on which account his father was very much displeased with him. The defendant objected to the deed prepared by *Thompson*, as varying from the proposal; and it was disapproved by his attorney, as going to secure all future debt. He denied, that he informed *Thompson* that his father had consented to give the security required; or had desired him to deliver the deeds to *Thompson*, in order to prepare a sufficient security for the payment of the debts, and of any other debts which might become due; or, that the defendant did deliver the deeds with such directions; and said, he would procure his father to execute them, &c. (according to *Thompson's* evidence); insisting, that *Thompson* did not require the deeds to be given up to him as a security for the said debts, &c.; or, that the plaintiffs might have a lien thereon; that the only purpose for which the defendant delivered them, and the inducement held out to him, was merely to furnish instructions for the mortgage security for the said loan, which *Thompson* assured him there was great probability of obtaining; and, if that should fail, then as instructions for preparing the conditional security before mentioned; and not to give a security for the said debts in the first instance.

—The defendants submitted, whether the plaintiffs have any lien upon the title-deeds and estates otherwise than as creditors, under a devise of *Matthew Wilkinson* for the payment of his debts.—*The Master of the Rolls*. I own that the cases which have held the deposit of deeds to constitute a mortgage, have always appeared to me to rest on very unsatisfactory grounds. If any act appeared, so unerringly speaking its purpose, that a court could infer, and execute such purpose, without the aid of any extrinsic testimony, a written declaration of the purpose might appear

to be altogether superfluous. But the mere fact, that the title-deeds of one man's estate are found in the possession of another, is not of this description. It is a fact, that may exist without any contract whatever: or it may result from a contract, of which it does not in any degree discover the particulars and details. If for these we are to resort to parol testimony, the effect to be given to the possession depends not on any inference, which it of itself affords; but on the evidence, by which the nature and the object of such possession shall have been ascertained; and how can that evidence be let in consistently with the statute of frauds? In the case of *Russel v. Russel*, an issue was directed to try, with what intention the lease was delivered. The fact of delivery was to have no operation, till the purpose of the delivery should be ascertained. So that, whether an interest in land did, or did not pass, was to depend on the testimony of witnesses, and not on any written contract between the parties. I do not see, why there should be such a disposition to relieve parties from the necessity of attending to the requisitions of the statute. There is no case where a man is willing to part with his title-deeds, in which he would not also be ready to sign a memorandum of two lines; specifying the purpose for which he had parted with them. By dispensing with any written evidence of the contract, an opening is left for all the fraud and perjury, which the statute was calculated to exclude. However, notwithstanding my doubts concerning the principle of the cases, to which I have been alluding, I may think myself bound to follow them, as far as they have gone: but I feel no disposition to go beyond them. Where the deposit is made at the same time that money is advanced, there is little to be supplied with reference to the nature of the agreement. It is obvious that the purpose of the deposit must be to secure the repayment of the money. The connection is not so direct



between a debt antecedently due and a subsequent deposit; nor is the inference so plain. But, what is the kind of case now before the court? Here are persons in trade, dealing with each other on credit. Some debts are due; some contracted; but the term of payment not yet arrived. New dealings may every day give rise to new debts. Under these circumstances what is to be gathered from the mere fact of a deposit of deeds, supposing the transaction to be of that nature? Is the deposit to be a security only for the debt due, or also for the debt contracted? The plaintiffs say, they were to have a security for every thing due, or to grow due. The defendants contend, that it never was in contemplation to give a security for more than the sum, of which the term of payment had previously elapsed. As I am of opinion, that this is not a case of a deposit of deeds, I am relieved from the necessity of considering how far I should have been bound by former decisions to proceed upon parol testimony in a case circumstanced as this is. It is clear that these deeds, if voluntarily delivered at all, were not delivered by way of deposit in the sense in which that word has been used in the cases: i. e. as a present and immediate security; but were delivered only for the purpose of enabling the attorney to draw the mortgage, which, it is alleged, *Wilkinson* the father had agreed to give. Passing by all the objections made to *Thompson's* testimony, and all consideration of the particulars, in which it is contradicted by the deposition of *Wilkinson*, and taking it exactly as it stands, it does in every part of it prove what I have stated with respect to the purpose, for which the deeds were put into his hands. Now in all the cases, that have been referred to, the deeds were delivered by way of deposit. Such deposit was indeed held to imply an obligation to execute a legal conveyance, whenever it should be required. But the primary intention was to execute an immediate pledge; with an

implied engagement to do all that might be necessary to render the pledge effectual for its purpose. But here there was no intention to put the deeds into pledge. That was not the thing which any of the parties had in contemplation. All that is alleged is, that *Wilkinson* had undertaken to execute a mortgage, when a mortgage should be prepared; and it is admitted, that the delivery of the deeds was to be made only a step towards its preparation. Can the accident of the death of the intended mortgagor give to such delivery an effect, which originally it was not intended to have? In *Brizick v. Manners* it appears, that Mr. *Manners*, the defendant's father, had agreed to give a mortgage to the plaintiff; and had delivered the title-deed to an attorney, with written instructions for preparing the mortgage. But Mr. *Manners* dying soon afterwards, the mortgage was not executed. The plaintiff by his bill claimed to be considered as a mortgagee for the sum, intended to have been secured. But Lord *Hardwicke* states that the point had been given up. In the late case, *Ex parte Coming*, this question did not arise; for it was by way of deposit that the deeds were set apart, and placed in the wife's custody. It has been intimated, that there have been cases, in which the effect of a deposit has been given to a delivery of deeds, made for the mere purpose of having a mortgage drawn. I will give the counsel an opportunity of looking for such cases: but, if none can be produced, I must hold that the plaintiffs have no lien on the estates in question.—The plaintiff's counsel admitting they could find no authority, the decree was taken accordingly.

EX PARTE GWYNNE, 1806, 12. VESEY, Jun. 379.  
—The petitioner had sold by auction timber, which had been felled upon his estate; and by the conditions of sale the purchaser was upon being declared so to give security

for payment of the purchase-money at the time stipulated. That was not done: but the purchaser took away part of the timber; paid some money on account; and afterwards became bankrupt. The petition prayed, that the timber remaining upon the estate of the petitioner may be sold; that the money produced by the sale may be paid to the petitioner in satisfaction of the sum remaining due under the contract; and that the petitioner may be at liberty to prove the residue under the commission.—The *Lord Chancellor*. The difficulty I had upon this case still remains; and the point can be determined only by a court of law. Where the sale before the bankruptcy has proceeded to the length, that either a total delivery has followed, or such a partial delivery, as both in law and equity prevents the stoppage *in transitu*, the property is vested in the purchaser; and then it is impossible to take it from the assignees, who might bring trover. A farther difficulty arises upon the clause, providing, that the purchaser, when declared, shall give security for payment of the purchase-money at the time mentioned in the conditions. That security, which ought to have been given immediately, never was given. The purchaser, therefore, not having complied with the conditions of sale, this party was not bound to deliver the timber; and therefore the contract was abandoned, and the property did not pass to the purchaser. But after the time at which he ought to have given security, which was immediately upon being declared purchaser, he took away part of the timber: whether by consent or not does not appear; and part of the purchase-money was received upon account. That raises a material question at law, whether that is not a waiver. Therefore let the timber remaining upon the estate be sold, and an action of trover be brought by the assignees against the petitioner: if the verdict is for the plaintiffs, the money to

be paid to them; and the petitioner must prove his whole debt: if for the defendant, then, giving credit for the money produced by the sale, he may prove the residue.

**MADDEN v. KEMPSTER, 1807, 1. CAMPBELL, 12.**  
 —Action for money had and received, to recover the sum of 60*l.* The plaintiff is a marine agent at *Portsmouth*; the defendant carries on the same business in *London*. In *February* last, Captain *Hart*, an officer in the marines, took his concerns out of the hands of the defendant, and placed them in those of the plaintiff. The defendant in the preceding *December* had, for the accommodation of Captain *Hart*, accepted a bill for 60*l.* at four months. On ceasing to be employed by him, he went to Messrs. *Abrahams* and *Rice*, attorneys in town, and agents of the plaintiff, and represented to them, that there was a balance of 60*l.* due to him from Captain *Hart*. Upon this, they gave him a cheque for the money on the plaintiff's banker, which was regularly paid. It appeared that the payee of the bill accepted by the defendant, had delivered it back to *Hart*, on receiving another in its stead; and the witnesses swore, they believed it was at that time cancelled or destroyed. *Abrahams* and *Rice* repeatedly stated these facts to the defendant, and pressed him to return the 60*l.*; but he refused to part with it, unless he had a bond of indemnity from the plaintiff. They offered him a verbal undertaking, that he should never be sued upon the bill; but he insisted upon a security under seal.—Lord *Ellenborough*. The defendant being under an acceptance to Captain *Hart*, whose agent he had been, might have retained a sum of money to answer that acceptance. But the plaintiff is entitled to recover this sum of money, the defendant having obtained it by misrepresentation. He mentioned nothing of the acceptance; he obtained it as a

*balance*, when no such balance was due to him. He therefore cannot set up the lien, to which he might otherwise have been entitled.—Verdict for the plaintiff.

CRESSWELL v. BYRON, 1807, 14. VESY, 271.—In this cause a petition was presented by a solicitor; stating, that in 1789 he was employed as solicitor for the plaintiff, and continued so to act until *July*, 1792; when, the plaintiff refusing to follow the advice of the petitioner and of counsel, the petitioner ceased to act as his solicitor. The petition farther stated, that the plaintiff is in indigent circumstances; relying upon the fund, which is the subject of the suit. The petitioner duly delivered his bill in *July* last; and by an order, dated the 23rd of *July*, it was directed, that all parties' subsequent costs should be taxed; and that, after the deduction of a sum, therein mentioned, one moiety of the residue of the fund should be transferred to the plaintiff. Under that order the petitioner's bill of costs and disbursements, as solicitor, amounting to 162*l.* 7*s.* 2*d.* taxed, as between party and party, at 67*l.* 3*s.* was received by him. The residue of his bill, being the costs as between solicitor and client, no part whereof was allowed in that taxation, amounted to 95*l.* 4*s.* 2*d.* The plaintiff threatens that he will receive the whole fund, and will not pay the petitioner, who is unable to find him; and whose whole demand will be lost, unless it shall be paid out of the fund in court.—The prayer of the petition was, that the petitioner's bill may be paid out of the fund in court; and that service of the petition upon the clerk in court may be good service.—The *Lord Chancellor*. The client may discharge his solicitor: but I do not know that a solicitor, whatever may be his reasons for declining to proceed, can claim a lien, if he does not carry the business through to a hearing. If that could take place, there might be numerous claims of lien. The Court of Com-

*mon Pleas*, when I was there, held, that an attorney, having quitted his client before trial, could not bring an action for his bill.—Petition dismissed without costs.

**BOARDMAN v. SILL**, 1808, 1. CAMP. 410.—Trover for some brandy, which lay in the defendant's cellars, and which when demanded he had refused to deliver up, saying it was his own property. At this time certain warehouse rent was due to the defendant on account of the brandy, of which no tender had been made to him. The *Attorney General* contended, that the defendant had a lien on the brandy for the warehouse rent, and that till this was tendered trover would not lie. But Lord *Ellenborough* considered, that as the brandy had been detained on a different ground, and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one, which would admit of some doubt. —The plaintiff had a verdict.

**HUSSEY v. CHRISTIE**, 1808, 9. EAST, 426.—The *Lord Chancellor* sent the following case for the opinion of this court. On the 28th of *July*, 1804, *John Hill*, the owner of the ship *Britannia*, engaged by a written contract the plaintiff *Hussey* as master of her, on a voyage to the *South Sea* fishery. [The case set forth the contract, but nothing turned upon the particular provisions of it: Amongst other things it stated, that *Hill* agreed to allow to *Hussey* for his own services and also for providing officers and crew for the voyage one-third of the neat proceeds of the adventure: and that *Hussey* should discharge all the lawful demands which the said officers and men might have on the ship and cargo.] The ship being equipped and provided for the voyage, the plaintiff took the command as master, and sailed from *England* in *September*, 1804, upon the voyage agreed upon, and prosecuted the

same with all due diligence; and, having procured a considerable cargo, arrived with the ship at *Port Jackson* in *South Wales*, in *June*, 1806; but in consequence of her having met with very severe weather and sustained much damage, it became impossible to prosecute the voyage further, without considerable repairs at *Port Jackson*. The plaintiff accordingly caused the necessary repairs to be done, and the articles of tackling and furniture wanting to be supplied, and expended a large sum of money for those purposes. But not being able to advance all the money necessary to complete the repairs, he drew several bills of exchange upon *Hill* the owner, for the purpose of raising money to supply the deficiency. Having completed the repairs necessary for bringing the ship and cargo home, the plaintiff set sail from *Port Jackson* for *England*; but in the course of the voyage it became necessary to make further repairs, and to procure a new cable; for all which the plaintiff was obliged to draw other bills of exchange on the owner, and also to give his own promissory note. The plaintiff arrived with the ship and cargo in *London* on the 15th of *April*, 1807. During his absence on the voyage, *Hill* the owner became a bankrupt, and a commission was duly issued against him, and some of the defendants were chosen his assignees. None of the bills of exchange mentioned have been paid by *Hill* or his assignees; and some of them have been taken up by the plaintiff, as the drawer, since his return with the ship. Nor has any part of the money expended by the plaintiff in the repairs of the ship and in providing the necessary tackling and furniture been repaid to him. The plaintiff intended and endeavoured to retain the ship in his possession until he had been reimbursed the money expended, and indemnified against the debts incurred by him as aforesaid; but *Hill's* assignees and the other defendants (who claim an interest in the ship or cargo,) or some of them, forcibly

took possession of the ship and brought her into the *London dock*. Whereupon, the plaintiff filed his bill in Chancery, amongst other things, for an injunction to restrain the defendants from disposing of the ship and cargo until his claim should be first satisfied : and the defendants having put in their answer, the Lord Chancellor directed this case to be stated for the opinion of this court upon the following question : Whether the plaintiff had any lien on the ship for the money expended or debts incurred by him for the repairs done to her on the voyage?—Lord *Ellenborough*, Ch. J. The question sent for our opinion is, Whether in point of law the plaintiff, the master, had any lien on the ship for money expended or debts incurred by him for repairs done to her on the voyage ; and we must look into the precedents of the common law to enable us to give an answer to it. It is admitted that there is no case at law where such a lien has been adjudged to exist. And though it be said that there must be a beginning in the case of liens ; yet I disclaim the right of originating it now : nor can I, in the absence of all authority, create a lien in a case where none has ever been before allowed, and when every case of lien is against the common law. How then does the law stand in this respect ? If the repairs be done here, the owners are liable ; though the master may also become liable on his own contract, if he do not stipulate against his personal liability, and confine the credit to his owners. If the necessary repairs be done abroad, the master may hypothecate the ship for them, and it is his own fault if he subject himself to any personal liability, which he may renounce. It is said, however, that because he may hypothecate, he may acquire a lien by taking upon himself the payment of the repairs : for that the persons to whom he hypothecates acquire an inchoate lien on the ship, inasmuch as they are entitled by suit in the Admiralty court to acquire possession of the ship itself.



But it does not follow, because others, through the master, and through his hypothecation, may acquire a lien on the ship, that therefore he himself has such a lien. Liens may be derived through the acts of servants or agents, acting within the scope of their employment, which they themselves had not. If a servant deliver cloth to a taylor, to make his master's liveries, the taylor indeed will have a lien on the cloth for the value of his work; but though the servant pay the taylor his charge, that will not give the servant a lien on the liveries. As to the cases in equity, I cannot consider them as professing to lay down any such rule as that the captain has a lien on the ship for repairs done abroad at his charge: the only difference between repairs done here and those done abroad is, that there he may hypothecate, and here he cannot: and the result of those cases is only that, when done abroad, steps may be taken for procuring an hypothecation, by which the persons making the repairs may acquire a lien on the ship: but we have no authority, sitting here, to originate such a lien. The case sent to us involves no question about the master's lien on freight, and therefore I shall give no opinion upon it. We will certify our opinion to my Lord Chancellor. —On the 30th *May*, 1808, the court certified that they had heard the case argued, and were of opinion, that the plaintiff had not any lien on the ship for the money expended or debts incurred by him for the repairs done to the said ship on her said voyage.

WARD v. HEPPLÉ, 1808, 15. VESY, 297.—A motion was made, that the former agent in town for the defendants may be ordered to deliver to the defendants or their present agent all deeds, papers, &c. in his custody, belonging to the defendants, on payment only of what if any thing, shall be found due from the present solicitor in the country, to him, as agent in the cause. The late agent

in the cause claimed a lien upon the papers, not only for what was due to him from the present solicitor, which was admitted to be trifling, but also for what was due to him, as agent in the cause, by the former solicitor, amounting to 232*l.*; for which and other debts he was a prisoner in *Dover* jail: the defendants insisting that he had been over paid; having received from them 65*l.*: the agent opposing to that allegation the length of the pleadings, and the nature of the cause; in the course of which one of the defendants came to town; and transacted business personally with him.—The *Lord Chancellor* said, he thought this point had been determined in this court; and by analogous cases at law; and apprehended, that the lien could not be maintained: the agent being considered as paying the clerk in court upon the credit of the solicitor in the country.—The *Register* was directed to search for precedents; and an order was made, that, the defendants undertaking to pay the late solicitor in the cause in the country what should appear to be due upon taxation, he should deliver his bill; and the agent in town should be at liberty to deliver his bill to the defendants, as agent for that solicitor in all business, done by him, for the defendants, as solicitor in this cause, or otherwise: the defendants undertaking to pay the agent what shall appear to be due to him after deducting what they have paid to the solicitor. The Master was directed to tax such bills; to take an account of the money advanced; and to ascertain the balance, if any, due to the agent. It was declared, that the agent in town has a lien upon the deeds, papers, &c. in his hands, for such balance, due to him from the late solicitor in the country; and the defendants were ordered not to pay the balance, or any part thereof, if found due from them to him, without the consent of the agent. The defendants were ordered, pursuant to such their submission, to pay to the agent what should appear to be due to him, after deducting what they

have paid to the late solicitor in the country; and to pay to that solicitor what shall appear to be due to him, after the payments, already made to him, and the payments, which they shall make to the agent in town in pursuance of this order; and thereupon the late solicitor in the country was ordered to deliver to the defendants all the deeds, papers, &c. in his custody, belonging to them; and, the defendants undertaking to redeliver the deeds, papers, &c. now in the custody of the agent in town, in case the court shall at any time order them so to do, that agent was ordered to deliver all such deeds, papers, &c. to the defendants; and liberty was given to him to apply to have them re-delivered to them.

STERLING, EX PARTE, 1809, 16. VESCY, 258.—A petition was presented by the assignees, under a commission of bankruptcy to have deeds and papers, belonging to the bankrupt, delivered up by an attorney; who claimed a lien upon them for his general bill.—An objection was taken on the ground, that these papers were delivered for the purpose of preparing a mortgage; and the lien was to be limited accordingly.—The *Lord Chancellor*. The general lien must prevail. Different papers are put into the hands of an attorney, as different occasions for furnishing them arise. In the ordinary case of lien I never heard of a question, upon what occasion a particular paper was put into his hands: but if in the general course of dealing the client from time to time hands papers to his attorney, and does not get them again, when the occasion that required them is at an end, the conclusion is, that they are left with the attorney upon the general account. If the intention is to deposit papers for a particular purpose, and not to be subject to the general lien, that must be by special agreement: otherwise they are subject to the general lien, which the attorney has upon all papers in his hands,

—The order was made for taxing the bill ; with a declaration, that the attorney has a lien upon the papers in his possession.

COWELL v. SIMPSON, 1809, 16. VESEY, 275.—*Bryan Edwards* died in the year 1800; indebted to his solicitors *Richard* and *Robert Shawe* for business done and otherwise to a considerable amount. The defendant, being one of his executors, employed Messrs. *Shawe* in the affairs of the executorship as solicitors, and also as his own solicitor. In *October*, 1800, he confessed a judgment as executor for the amount of their demand; but he had not possessed assets, subject thereto, sufficient to discharge it. In 1808 they sent in their bill; and the defendant gave them two notes, payable with interest three years after date: one dated the 1st of *October*, 1807, for 371*l.* 18*s.*: the other, dated the 1st of *October*, 1808, for 705*l.* 18*s.* 6*d.*—The bill was filed against the defendant, as executor, for an account; and the defendant, wishing to employ another solicitor, applied to Messrs. *Shawe* for his papers; offering to pay the sum of 82*l.* 0*s.* 9*d.*, the amount of their bill, delivered for business done subsequent to the settlement in 1808: but they declined to deliver the papers without payment of the money, secured by the judgment and the notes; though the defendant has not since the judgment possessed assets, and the notes are not payable.—A motion was made by the defendant, that on payment of 82*l.* 0*s.* 9*d.* Messrs. *Shawe* may deliver up on oath all deeds, books, papers, &c. belonging to the defendant; insisting, that by taking the personal security of the defendant for the other demand, they had relinquished their lien.—*Lord Chancellor*. It is now very well settled, that, if an estate is sold in this court, and nothing more passes, the vendor, though he has conveyed the estate, has a lien for the purchase-money. The older

cases with reference to this particular species of transaction seem to have aimed at this distinction ; which I collected, as borrowed from the civil law ; that a security for the money puts an end to the lien : the special contract superseding the implied contract : but there are many decisions in this court against that. I am not sure, however, that the doctrine as to vendor and purchaser will apply to this case. I remember being in some degree distressed at finding, with regard to questions of lien as to other property, not real estate, a great deal of doctrine, undisturbed, that by taking a security the lien was given up ; and the express contract determined the implied one. Where by the usage of trade a person has a lien on goods in his hands for work performed upon them, and farther, for work upon other goods, not then in his possession, having been delivered over, according to the usages of different trades, it is settled by modern decisions, that by taking a security the lien is gone, even with regard to the goods in his possession ; and cannot accompany that special security ; which determines the implied contract. It is necessary to see upon what principle that stands. I rather think it is not regulated by the usage of trade. It has been accounted for in this way ; that the lien is gone by the effect of the intention to substitute the special contract for the implied one : the necessities of mankind requiring, that the goods should be delivered for consumption, it is not to be presumed, that the lien was to be extended through the whole period ; which would create much difficulty in the usual course of dealing between tradesmen and their customers. I have, however, heard that denied ; and it has been put upon a rule of law, that the special contract removes the implied one : but, if that is the ground, this case would deserve much consideration. The solicitor taking a security, which has three years to run, as the client may have occasion for his papers, there is as

much reason that the lien should not accompany the security through that period, as in the instance of a trade; and the conclusion is equally difficult, that the papers, if the client has occasion for them, could be withheld. I am not at present satisfied that this lien exists. The practice with regard to the lien of an attorney upon papers is not very ancient. Lord *Mansfield* states that expressly; and that he had argued the question in the Court of Chancery; and Sir *James Burrow* mentioned the first decision, which established it in a court of law by analogy to other cases of lien. Looking through the general doctrine of lien, as applicable to all cases, except the purchase of an estate, with reference to which it has in a series of decision been extended, it may be described as *primâ facie* a right accompanying the implied contract. In the case of a factor, who has a lien both for his expenditure upon the goods in his possession and his general balance upon former transactions, entering into a special contract for a particular mode of payment he loses the lien. In various trades the demand being for work and labour, applied in some instances upon the particular goods, in others upon other goods also, though the possession had been given up, it is universally laid down, that if that takes place under a special agreement, there is no such lien; and if it commenced under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing the one contract destroys the other. The exigencies of mankind requiring the goods to be delivered for consumption, the implication from an engagement for security of an engagement to deliver the goods without payment is necessary: otherwise from a promissory note, payable in three years, a contract must be implied, that the goods are to be retained during that period; destroying the other special contract. So, in this instance, if the solicitor says, he will not proceed in the business, and will not deliver up the

papers, the consequence is, that he destroys the express contract to postpone payment for three years. Therefore, unless from the fact, that he has taken this security, you can imply, that he is to keep the papers three years, though the vital interests of the owner may depend on the possession of them, the implication is necessary, that he is to deliver them up, and rely on the other contract. I do not enter into the question, whether he was obliged to go on, farther than to observe, that a client at law cannot change his attorney without leave of the court; and there is no mutuality, if the attorney has an absolute discretion to relinquish the cause. Suppose a sum of money declared to be due by decree or judgment: it is clear, according to the established rule of lien, and the practice, that the attorney may give notice to the defendant not to pay the money, until his costs are satisfied. How can that lien be consistent with a special agreement to give credit for three years, receiving interest? He must either abandon that contract, or claim under it and his lien also; insisting, that notwithstanding that contract he will not permit the client to receive the money for three years. The proposition, that the lien can exist after such a special contract, necessarily involves a contradiction to that contract. My opinion, therefore, is, that where these special agreements are taken, the lien does not remain; and whether the securities are due or not makes no difference. The case at the *Rolls* has no application. Business had been done by the attorney during a course of years. At a particular period security was given; and afterwards the residue of the money was paid. A second settlement took place; and the balance was secured by bond, payable in 1801. There was no demand beyond that bond, except 11/. The bond became due; and under those circumstances a petition was presented, not disclosing those facts, praying a general

taxation of the bills; which could not possibly be due. To make that case similar to this, the application should have been previous to the time, when the bond was due; submitting, whether, as a bond had been given, though it was not due, the lien could remain.—The order was made accordingly, that on payment of 82*l.* 0*s.* 9*d.* the solicitors should deliver up the papers belonging to the defendant either in his own right, or as executor.

SNOOK *v.* DAVIDSON, 1809, 2. CAMPBELL, 218.—Trover for a policy of insurance.—The question was, whether the defendants had a lien upon this policy for the general balance due to them from one *John Carter*? In December, 1808, and January, 1809, the plaintiffs gave instructions to *Carter*, an insurance broker, to effect several policies for them. *Carter*, instead of doing so himself, without their consent or knowledge, employed the defendants, who are likewise insurance brokers, to effect the policies. He told the defendants, they were for a correspondent in the country; and it appeared from the policies themselves, which he delivered to them, that they were for the plaintiffs, as they were all filled up in their names. The defendants got the policies underwritten, and advanced the premiums; no part of which has yet been repaid to them. All the policies were delivered to *Carter*, except that on which the action was brought. In January, 1809, *Carter* was declared a bankrupt. The plaintiffs were then indebted to him in a larger sum than the balance due from him to the defendants. Before the commencement of the action, the plaintiffs tendered the defendants 17*l.* 6*s.* 6*d.* the amount of premiums and commission on the policy in question; but the defendants refused to deliver it up, unless the balance due to them from *Carter* were completely satisfied.—Lord *Ellenborough*. There is no privity be-



tween you and this party. A sub-agent employed as the defendants were, cannot acquire the broker's general lien.  
——Verdict for the plaintiffs.

LANYON v. BLANCHARD, 1811, 2 CAMPBELL, 597.  
—This was an action to recover the amount of a loss received by the defendant, upon a policy of insurance which he had effected as a broker.—The plaintiff being at *Monte Video*, wrote to one *Crowgy* at *Falmouth*, inclosing an unindorsed bill of lading, of certain tallow, deliverable to the shipper's order, and directing him to effect an insurance on the tallow, and to employ a good house at *Liverpool* to sell it, for the plaintiff's benefit. *Crowgy* came to *London*, employed the defendant to effect the insurance, represented that he had authority to indorse the bill of lading, and actually did indorse it accordingly, to a person at *Liverpool* named by the defendant. The defendant effected the policy. The ship was lost, and he received the sum insured from the underwriters. This he claimed to retain, to satisfy a balance due to him from *Crowgy*.—Lord *Ellenborough* was of opinion, that in transactions of this sort, if an agent represents himself to have a power which is not intrusted to him, his principal is not bound by his acts; that the person who gives faith to the representations of the agent must run the risk of their being true or false; and that as *Crowgy* had no authority to indorse the bill of lading, or to act as proprietor of the tallow, the defendant was only a sub-agent, and could not retain the sum he had received upon the policy from the person, for whose ultimate benefit it was effected.—Verdict for the amount of the loss, subject to a deduction for the premiums and other charges due on this particular policy.

WOLF v. SUMMERS, 1811, 2. CAMPBELL, 631.—

Trover for a trunk filled with wearing apparel, and a writing desk. The plaintiff had returned to *England* from the *Brazils* in a ship, of which the defendant was master. The plaintiff himself came ashore at the first port the ship made in the channel, and travelled to *London* by land. The articles in question, which were part of his luggage, he left behind him to come round with the ship. When she arrived in the river, he sent to demand them; but the defendant refused to deliver them up till he should be paid 15*l.*—saying, that the plaintiff was to pay 30*l.* for his passage, and had then paid only one half of that sum.—*Lawrence, J.* The master of a ship has certainly no lien on the passenger himself, or the clothes which he is actually wearing when he is about to leave the vessel; but I think the lien does extend to any other property he may have on board. A certain sum is agreed to be given for carrying the man and the luggage. I think the captain has a lien for this upon the luggage. In detaining that, there is no greater inconvenience than in the common case of goods and merchandize carried on freight; and there is no reason why there should not be the same lien for the recovery of passage money as for the recovery of freight. I conceive the defendant had a right to say to the plaintiff, “You shall not have your things till you pay me what is due for bringing them and you from *Brazil*,” and that in refusing to deliver them up, he was not guilty of any tortious conversion. Evidence was given that 30*l.* was a reasonable sum for the plaintiff’s passage in the steerage of the ship, and the defendant had a verdict.

PHILLIPS *v.* RODIE, 1812, 15. EAST, 547.—In trover for 179 bales of cotton, which was tried at *Lancaster*, before *Wood, B.*, a verdict was found for the plaintiffs for 1,955*l.* 18*s.* 2*d.*, subject to the opinion of the court on the following case. On the 15th of *October*, 1810, *White*

the bankrupt, entered into a charter-party with the defendants for the hire of the ship *Flora*, of which the defendants are owners, on a voyage from *Liverpool* to *Surinam*, and back again. By the charter-party the vessel was to carry such lawful goods as *White* or his agents chose to put on board, without any specification as to the sort of goods. And after providing for the delivery of the outward cargo at *Surinam*, and loading the homeward cargo there for *Liverpool*, the defendants agreed that the master should proceed, wind and weather permitting, with the vessel and cargo to *Liverpool*, and on her arrival there should deliver the same to *White* or assigns, in the same state and condition as when put on board; the dangers of the seas and other inevitable accidents excepted; and to end the said intended voyage. *White* agreed that he would, within 21 running days, to be computed as after-mentioned, cause a cargo of lawful goods to be loaded on board the vessel at *Liverpool*, and in 40 running days would cause the same to be discharged, and the vessel loaded again with a full and complete return-cargo of lawful goods at *Surinam*, and to be discharged in *Liverpool*. *White* also agreed to pay to the defendants for the freight of the vessel from *Liverpool* to *Surinam*, for all goods put on board, and in lieu of custom-house duties, &c. 105*l.*, by an approved bill on *London*, not exceeding three months date; and for the freight from *Surinam* to *Liverpool*, for all goods put on board her at *Surinam*; at the following rates, viz. 1*l.* for every cwt. of sugar, 12*s.* 6*d.* per cwt. in every bag of coffee, 13*s.* 6*d.* per cwt. in every cask of coffee, 2½*d.* for every pound of cotton in square bags, and 3*d.* for every pound of cotton in round bags. But if the vessel should not be fully laden with the return-cargo, then *White* should not only pay for the goods which should be on board, but also for so much in addition as the vessel would have carried.

*White* should not within the time aforesaid put any lawful goods on board the vessel, then that he should, on the arrival of the vessel at *Liverpool*, pay full freight for the vessel to the defendants, as if she had been fully laden with goods of the description before-mentioned: with 5*l.* per cent. primage in lieu of all pilotage, port, and other charges: such freight and primage to be paid in the following manner, viz. so much money as might be necessary for the ship's disbursements at *Surinam*, to be paid there free of commission and interest, and the remainder to be paid on the delivery of the cargo at *Liverpool*, in an approved bill on *London*, not exceeding three months' date. And in case *White* should not cause the cargo to be put on board the vessel at *Liverpool* within 21 running days, to be computed from the time of her being ready to receive the cargo, and notice thereof given to *White*, &c. then *White* should pay to the defendants 15*l.* 15*s.* for demurrage for each day, &c. over and above the said 21 days for loading the vessel at *Liverpool*. And in case *White* should not cause the vessel to be discharged at *Surinam*, and there loaded with her homeward cargo, within 40 running days, to be computed from her arrival at a proper place of discharge, and being reported and ready to unload and load the return-cargo, and notice thereof to *White*, &c., then that he should pay to the defendants the further sum of 15*l.* 15*s.* for demurrage for each day not exceeding 20 days, over and above the said 40 days, &c. for discharging and loading the vessel at *Surinam*; but *White* should not on any account detain the vessel beyond the said 20 days after the expiration of the said 40 days, but should prior to that period load the vessel with a full and complete cargo of lawful goods as before mentioned. The case then stated that the ship sailed from *Liverpool* within the time limited by the charter-party, and arrived at *Surinam*, and there delivered her outward cargo to *White's*

agent. That *White* paid the defendants for the freight of the ship from *Liverpool* to *Surinam*, pursuant to the terms of the charter-party. That the ship was detained by *White* at *Surinam* 18 days beyond the time limited in the charter-party for that purpose, and thereby 283*l.* 10*s.* accrued for demurrage of the vessel for such time as she was so detained; and a bill was drawn by *White's* agent in favour of the defendants at 60 days sight, upon *White*, for that sum; but before the bill arrived, *White* having become bankrupt, it was refused acceptance before the demand of the goods, as after-mentioned, and still remains unpaid to the defendants, who are now the holders thereof. That the ship sailed from *Surinam* on the 3d of *February*, and arrived at *Liverpool* on the 22d of *March*, 1811; which was after *White's* bankruptcy; having 179 bales of cotton on board, containing 57,225 pounds, which were the property of and consigned to *White*; and three several bills of lading were given to the agent of *White*, by the captain of the *Flora*, one of which is dated *Surinam*, 24th of *January*, 1811, for 121 bales; another dated 2d of *February*, 1811, for 19 bales; and the 3d dated 2d of *February*, 1811, for 39 bales. The form of one of the bills of lading was set forth in the case, of which this is the substance—"Shipped, by the grace of God, &c. in the good ship *Flora*, &c. now riding in the river *Surinam*, bound for *Liverpool*, to say, 121 bales cotton, being marked, &c., and are to be delivered in like good order, &c. at *Liverpool*; (the act of God, &c. excepted,) unto *T. White*, or his assigns, he or they paying freight for the said goods, and three stivers per pound, with primage, and 10*l.* per cent. average accustomed. In witness, &c." *White's* agents also loaded on board the ship at *Surinam* about 60 bales of other cotton or freight, which freight has been received by the defendants. The 179 bales of cotton belonging to *White* were put on board the *Flora*,

before, or on the respective dates of the said bills of lading. The ship was not loaded at *Surinam* with a full and complete return-cargo of lawful goods by *White*, according to the tenor of his covenant, but there was sufficient room in the vessel to stow 299 bales of cotton over and above the quantity on board, and independent of one-eighth of the whole space of the hold, which was occupied by ballast, which would have been unnecessary if the ship had been fully laden with a complete cargo of goods; and the deficiency in the freight, on account of the vessel not being laden with a full and complete cargo of cotton, would amount to 1254*l.* 15*s.* 6*d.*; but if loaded with sugar or coffee, the amount would be to be ascertained by a different calculation. The plaintiffs, as assignees of *White*, on the 10th of *April* last demanded from the defendants the delivery to them (the plaintiffs) of the said 179 bales of cotton, and tendered to the defendants a sufficient sum for freight, primage, duties, and other landing expenses on the said 179 bales. But the defendants refused to deliver the said 179 bales to the plaintiffs, or to accept the money tendered; alleging they had a right to retain the same, and had a lien thereon for the freight on the deficiency in the vessel's cargo, which is usually called *dead freight*, according to the terms specified in the charter-party and the covenant of *White*; and also of the demurrage due on account of the vessel's being detained at *Surinam* as aforesaid; but which demands for demurrage or dead freight the plaintiffs refused to pay. The value of the 179 bales of cotton, after deducting freight upon them at 3*d.* per pound, and primage thereon, duties, broker's charges, and all other expenses, are agreed to amount to 1955*l.* 18*s.* 2*d.* for which the verdict was taken. If the plaintiffs were entitled to recover, the verdict was to stand: otherwise, a nonsuit was to be entered.—Lord *Ellenborough*, Ch. J. It is impossible in this case, without the intervention of a

jury or an arbitrator, to settle what is the sum to be tendered: it would be taking a leap in the dark. Where there is no custom to regulate the proportions and the amount, the case must necessarily rest in damages. What is a lien for freight but a right to detain the goods on board until the freight, which has been actually earned upon them, which is always capable of being calculated and ascertained, has been paid, and where the owner of the goods knows what he is to tender? But here the claim to retain is for the amount of damages unascertained, which the parties are entitled to recover for the non-completion of the cargo, commonly called *dead freight*; but it is that term, *freight*, which has misled the defendants; for it is not *freight*, but an unliquidated compensation for the loss of freight, recoverable in the absence and place of freight. The covenant is in effect to load the vessel fully, or if not, so indemnify the ship-owner by paying so much in addition as the vessel would have carried: the covenant, in the event of no loading, is to pay full freight *for the vessel*, (not for goods not loaded,) as if she had been loaded with goods of the description before mentioned: that must depend on the tonnage of the vessel. In order to found the argument, the covenant should have been to pay full freight as if the goods had been actually loaded on board, and that the master should have the same lien upon the goods actually on board as if the ship had been fully laden with all the goods covenanted to be loaded. But if we were to put this construction upon the contract as it now stands, it would be making a new contract for the parties. There is no pretence or colour for the lien now claimed; it is a lien to attach upon a non-entity: the plaintiff's action of trover, therefore, is not met by any defence.—*Grose, J.* A lien must attach upon some certain thing; and here there is nothing for it to attach

upon.—*Le Blanc and Bayley*, Justices, assented.—  
Postea to the plaintiffs.

**BISHOP v. WARE**, 1813, 3. CAMP. 360.—This was an action on the case for not delivering goods according to a bill of lading,—with a count in trover. The plaintiffs shipped at *Hull*, on board a vessel belonging to the defendant, a package of files, to be carried to *London*. The bill of lading was in the usual form, stating that the goods were to be delivered on payment of freight. When the vessel had arrived and was moored off *Custom-house Quay*, the plaintiffs sent a barge for their goods, which they required to be put over the ship's side into the barge, at the same time tendering the freight. The captain insisted upon his right to wharfage as well as freight, and refused to deliver up the goods till the wharfage was paid.—It was now proved, by way of defence to the action, that when goods are put over the ship's side after she is moored at the wharf, half wharfage is usually paid by the consignee,—which was contended to be a reasonable demand, as the goods derive a benefit from the ship being moored at the wharf, although they are not actually landed there.—*Sir James Mansfield*. If the goods are not landed, a compensation must be made for the benefit derived from the wharf, by the owner of the ship. The goods cannot be subjected to this charge, more than to many others which are incurred by the ship in the course of the voyage. According to the bill of lading, the goods in question were to be delivered on payment of freight. The defendant, therefore, could have no right to detain them for wharfage.—The plaintiffs had a verdict.

**HALKETT, EX PARTE**, 1814, 3. VES. & BEAMES, 135.—The petition stated, that in 1811, the *Canton East*



*India* ship being at *Canton*, it became necessary for the use of the ship to borrow upon her credit 6000 dollars; which sum was advanced by the petitioners, upon an agreement with the captain to advance it on the security of the ship; as is usual in such cases; and to receive bills upon the owners at six and three months sight. The petition averred, that it is usual in such cases, and was expressly understood and agreed that the said sum was advanced by the petitioners upon the credit of the ship, as well as of the said bills of exchange; and that the ship, her captain and owners, were to be jointly and severally liable. The bills were accepted by the managing owner; who, before they were due, became a bankrupt: and the assignees took possession of the ship upon her arrival; and sold her.—The prayer of the petition was, that the assignees under the commission may be ordered to pay the bills, with interest, out of the produce of the sale.—The *Lord Chancellor*. That case has the specialty, that the advance was made the captain himself; raising this distinction, that the master must have the lien without an instrument; as he cannot execute an instrument to himself: but that does not determine, that a third person has the lien. Direct an inquiry as to the nature of this advance. The allegation is too loose. The distinction is very material, whether it was for repairs, or for other purposes, for instance, victuals for the seamen. In the case of repairs the authorities seem to establish the lien.

HOOPER v. RAMSBOTTOM, 1814, 4. CAMPBELL, 121.—Trover for deeds. By indenture, bearing date 24th December, 1811, *John Jones* demised certain premises in *Gracechurch-street* to *John Storm* for the term of 21 years. By mesne assignment this lease became vested in *John Whittle Harvey*, a partner in the firm of *Harvey and Son*, bankers in *Essex*. In August, 1813, he agreed

to sell it to *Wells*, the bankrupt, for 630*l.*; that 130*l.* of this sum should be paid in cash; that for the residue *J. W. Harvey* should draw five bills of exchange on *Wells* at 2, 6, 12, 18, and 24 months, and that the assignment of the lease from *J. W. Harvey* to *Wells*, together with the original lease, and the mesne assignments, should remain in the hands of *Daniel Whittle Harvey*, an attorney, as a collateral security for the payment of the bills. The bills were drawn, and the deeds lodged with *D. W. Harvey* accordingly. Two of the bills were paid,—when *Wells* became bankrupt. *J. W. Harvey* being then very much pressed for money, went to *D. W. Harvey*, and obtained from him the original lease and mesne assignments. These he pledged with the defendants, his town bankers, with other securities, and the defendants *bonâ fide* advanced a considerable sum of money upon them. He likewise gave them the three bills accepted by *Wells* which remained unpaid. The plaintiffs before the commencement of this action tendered payment of these bills to the defendants, and to the assignees of *J. W. Harvey*.—*Gibbs*, Ch. J. I am opinion that the plaintiffs are entitled to recover. Had the deeds been left in the hands of the assignor, this would have been like the case which has been put of the second mortgage. But they were deposited with *D. W. Harvey*, to be given to *Wells* when the instalments were paid. A wrong was committed when he parted with them to another person, and the defendants cannot at any rate acquire a greater lien on the deeds than existed when the original deposit took place. The money due upon the bills with interest has been tendered. Therefore the plaintiffs would have been entitled to recover the deeds from *D. W. Harvey*, and have the same right as against the defendants. —Verdict accordingly, which was afterwards approved of by the court, on an application for a new trial.

**RAITT v. MITCHELL, 1815, 4. CAMPBELL, 146.—**  
**Case.** The declaration contained several special counts for wrongfully detaining the plaintiff's ship, which had been delivered to the defendant to be repaired,—with a count in trover. The defendants are shipwrights, and have a dock in the river *Thames*. In *October* last, the plaintiff having purchased an *East Indiaman*, called the *Ocean*, delivered her to the defendants to be repaired, and she was placed in their dock for that purpose. Nothing whatever passed between the parties with respect to the time or manner in which the repairs were to be paid for, until the end of *December*, when they were completed. The plaintiff having then required that the ship should be delivered back that she might proceed on her voyage to the *East Indies*, the defendants said she should not leave their dock till security was given for the repairs, which amounted to above 3000*l.*, and considerably exceeded what they supposed would have been necessary. The plaintiff, protesting against the defendants' right to detain the ship,—from his anxiety to get possession of her, was willing to give them security for the fair amount of their bill; and to ascertain this, several meetings took place between the parties, and arbitrators were appointed. However, they could arrive at no conclusion upon the subject, and the defendants peremptorily refused to allow the ship to be undocked till the whole of their demand was paid, or security given for it.—On the part of the plaintiff, it was now proved, that by the usage of trade in the river *Thames*, where there is no express agreement as to the time of payment, the shipwright invariably gives credit for repairs to the owner of the ship repaired. The credit varies in different trades. It is generally fifteen months; with respect to *East India* ships, it is eighteen months; but without a previous stipulation for that purpose, neither a ready money payment, nor security is ever required.—

**Lord Ellenborough.** I am of opinion that in this case the defendants had no right to detain the plaintiff's ship. It is distinctly proved that where there is no express stipulation for a ready-money payment, credit is invariably given by shipwrights in the river *Thames*. The period of credit varies in the different trades in which ships are employed; but in each trade it appears to be uniform, and for the repairs of Indiamen we are told it is 18 months;—at the expiration of which time it is expected they shall have returned from their voyages, and put funds into the hands of their owners by the freight they have earned. This being the invariable usage, I must consider it as the basis of the contract between these parties; and their respective rights and liabilities are precisely the same as if, without any usage, they had entered into a special agreement to the like effect. In that case it seems to be admitted that no lien could be claimed. To be sure, a lien is wholly inconsistent with a dealing on credit, and can only subsist where payment is to be made in ready money, or there is a bargain that security shall be given the moment the work is completed. I do not say that a shipwright has not a lien on a ship in his dock, where he is to be paid in ready money as soon as the repairs are finished. On the contrary, I am inclined to think that he has a lien like other artificers. But there can be no lien without an immediate right of action for the debt, and that does not accrue till the period of credit has expired.—Verdict for the plaintiff.

**HEYWOOD v. WARING, 1815, 4. CAMPBELL, 291.**  
—This was an issue directed by the *Lord Chancellor*, to try “whether *Humble and Holland* had any lien, and to what amount, at the time of their bankruptcy, on the proceeds of the cargo of a ship called the *Elegante*, then in the hands of certain persons using the firm of *James*

*Waring and Co.*" The two bankrupts carried on business in partnership together at *Liverpool*, under the firm of *Humble and Holland*. *Holland* was at the same time in partnership with *Frederick Holmes* at *Messina*, under the firm of *Holland, Holmes, and Co.* There was likewise a firm at *Malta* of *Holland and Co.*, consisting of *Holland* and four other persons. In the year 1810, *Holland, Holmes, and Co.* shipped a cargo on board the *Elegante* at *Messina*, consigned to *James Waring and Co.*, of *London*, and on the 15th of *July* wrote to them as follows:—"This vessel and cargo we have disposed of to Messrs. *Holland and Co.* of *Malta*, and we have given them a letter to you to that effect. A copy of it we inclose, and we fully confirm the contents, requesting you to account to them alone for the balance." In the letter given to *Holland and Co.*, addressed to *James Waring and Co.*, *Holland and Holmes* say, "in consequence of an arrangement with Messrs. *Holland and Co.* of *Malta*, we hereby request you will account to them for the net proceeds of the cargo consigned to you by us, per our polacca ship *Elegante*." On the 23d *August*, 1810, *Holland, Holmes, and Co.*, *Holland* being then at *Messina*, wrote to *James Waring and Co.* saying, "Messrs. *Holland and Co.* of *Malta*, having failed in performing part of the agreement, in faith of which we had directed you in our respects through them of the 5th ultimo, to pay to their order the balance that may be accruing to us from net proceeds of *Elegante's* cargo as therein detailed, we are under the necessity of revoking those orders, and we do hereby revoke and rescind our said letter of the 15th *July* in their favour; and request you to place the net proceeds of her cargo, or of both cargo and ship, (in case of loss or capture of her,) to the credit of our account current, and not to pay any part thereof to Messrs. *Holland and Co.* or their order, notwithstanding any thing

they may write to the contrary, or that may be stated to you by Mr. *Swinton Coalhurst Holland*, who is at present (as we are given to understand) established in business in your city. On account of the net proceeds of cargo by that vessel, or on our general account, as you may deem right to place the amount, we have taken the liberty to value on you on the 20th instant at 30 days, for 400*l.* sterling, order of *Cumming, Pater, and Co.*; and for 100*l.* order *John St. Leger Hansard*, which we request that you will in any case honour and place to our debit in account. We have stated the amount on the drafts to be an account of shipments *per Elegante*, being nearly certain that this will reach you before you can have executed the disposition made in ours of the 15th ult., and will of course prevent your doing so; and under this idea, we further request that you account to Messrs. *Humble and Holland of Liverpool* for 3000*l.* sterling, say allow them to draw on you at three months' date for that sum on our account, to be paid out of the net proceeds of that vessel's cargo." At the date of this letter, *Holland, Holmes, and Co.* were indebted to *Humble and Holland* in a sum of money, about 6000*l.*, which still remains due. *Holland, Holmes, and Co.* at the same time wrote to *Humble and Holland*, and informed them of their having requested *Waring and Co.* to accept their drafts at three months' date for 3000*l.* against the proceeds of the *Elegante*. These letters to *Waring and Co.* and *Humble and Holland*, were received on the 9th of *October*, 1810, and two days after *Humble and Holland* drew on *Waring and Co.* six bills of exchange, amounting to 3000*l.* which they refused to accept, on the ground that an attachment to the amount of 10,000*l.* had been laid on the property of Messrs. *Holland, Holmes, and Co.* in their hands, by Messrs. *Holland and Co. of Malta*. *Waring and Co.* sold the cargo of the *Elegante*, and when the bills were

drawn upon them, they had a sufficient sum arising from the proceeds to have paid the bills. This sum continued in their hands till after the respective bankruptcies of *Humble and Holland*. The attachment by *Holland and Co.* of *Malta* was abandoned, there being nothing due to them from *Holland, Holmes, and Co.* On the 25th of October, 1810, *Holmes*, the partner of *Holland* in the house of *Holland, Holmes, and Co.* wrote the following letter, in the name of that firm, to *Waring and Co.*, but without the privity of *Holland*.

“ *Messina, 25th October, 1810.*

“ Messrs. *James Waring and Co.*

“ Gentlemen,

“ The purport of the present is solely to request, that if, as we fully hope, the *Elegante* and her cargo come into your hands, that you will on no account pay any part of the net proceeds to Messrs. *Samuel Holland*, Messrs. *Humble and Holland*, or to Mr. *J. C. Holland*, but hold the whole to our credit on account, and wait our direction as to the disposal of it.

“ We are truly, Gentlemen,

“ Your most obedient servants,

“ *Holland, Holmes, and Co.*”

A commission of bankrupt issued against *Holland* in November, 1810, against *Holmes* in October, 1811, and against *Humble* in April, 1813.—Lord *Ellenborough*. *Humble and Holland* may be entitled to the 3000*l.* in question; but I do not see how they can have a lien on the proceeds of this cargo to that or any other amount. They never were in possession either of the cargo or of the proceeds; and without possession there can be no lien. A lien is a right to hold; and how can that be held which was never possessed? I can only look to see whether *Humble and Holland* could hold the proceeds of this cargo in satisfaction of their own debt; and they certainly

could not, as neither cargo nor proceeds were ever in their possession to be held.—Plaintiffs nonsuited.

**WILSON v. M'TAGGART, 1813, 1. MAULE & SELWYN, 157.**—The plaintiffs declared as owners of the ship *Harmony*, for the freight of a certain quantity of sugar and rum from *St. Croix to London*, and stated that the master signed bills of lading for the same deliverable to *Williams* and *Wilson* or their assigns, he or they paying freight for the said goods; that the ship arrived on the 1st of *July*, 1810, of all which the defendants had notice. That the said bills of lading were indorsed by *Williams* and *Wilson* to the defendants, who thereby became the assignees of *Williams* and *Wilson* in that behalf, and owners and proprietors of the said goods; and thereupon in consideration of the premises, and that the plaintiffs as such owners of the ship, at the special instance and request of the defendants, would deliver the said goods from and out of the said ship to the defendants under the said bills of lading, the defendants undertook and promised the plaintiffs to pay them freight for the said goods according to the said bills of lading. That the plaintiffs confiding in the said promise and undertaking, did deliver the said goods out of and from the said ship to the defendants under the said bills of lading; and although the defendants had and received the said goods out of and from the said ship under and by virtue of the said bills of lading, and the freight according to the said bills of lading amounted to 3000*l.*, yet the defendants did not, although requested, pay the said freight, &c. There were several other counts, and amongst them the fourth count was in the common general form, that the defendants on the same day, &c. were indebted to the plaintiffs in 3000*l.* for certain freight due and payable from the defendants to the plaintiffs in respect of certain goods before that time carried on board a certain other



ship from *St. Croix* to *London*, and delivered at *London* to the defendants and at their request: and being so indebted, the defendants in consideration thereof promised to pay it. There were also the common money counts. —It appeared in evidence before Lord *Ellenborough*, Ch. J. at the trial in *London*, that the ship *Harmony* was let to freight by the plaintiffs to a house at *Liverpool*, now under the firm of *Williams* and *Wilson*, to whom the goods were consigned, and who received the bills of lading for the same, which were in the usual form, to deliver the goods to *Williams* and *Wilson*, or their assigns, *he or they paying freight for the same*. The defendants were considerable brokers in *London*, and being very largely in advance to *Williams* and *Wilson*, by whom they were employed as brokers, took from them by way of security the bills of lading, and afterwards made further advances upon them, which bills of lading *Williams* and *Wilson* indorsed to them *before* the arrival of the *Harmony*, which was reported at the custom-house in *London* on the 19th of *June*, 1810, after her entrance into the *West India* docks. The entry was made at the custom-house by the defendants in their names, and they paid the duties; but under their direction the goods were landed on the quays at the *West India* docks in the names of *Williams* and *Wilson*, their names being in the manifest as consignees. An application was made for the freight by the ship-brokers for the plaintiffs to the defendants as brokers for the consignees in *August*, 1810, and the defendants referred them to the consignees at *Liverpool*, to whom the plaintiffs then addressed a letter, dated 7th of *September*, 1810, demanding 2904*l.* 19*s.* 3*d.* as the amount of the freight. Soon afterwards *Williams* and *Wilson* became bankrupts, and the plaintiffs proved this as a debt under their commission on the 4th of *May*, 1811, and stated that their demand arose under the charter-party of 3d *October*, 1809. On

the 3d of *July*, 1810, the order of *Williams* and *Wilson* to the *West India* Dock Company for the delivery of the goods to the defendants was received by the officer at the docks, which order was to the following effect: "To the directors of the *West India* Dock Company. Please to deliver to Messrs. *Kymer* and Co., or their order, the following goods consigned to us (inter alia) the cargo of the *Harmony*." (Signed *Williams* and *Wilson*.) Under this order the goods were transferred to the defendants, and were afterwards sold by them in the course of *July* and *August*, and the amount credited by them to *Williams* and *Wilson*'s account. It was objected that the action would not lie against the defendants, but should have been brought against *Williams* and *Wilson*, who were the consignees, and to whose order the goods were delivered to the defendants as their brokers, and that the entry of the goods at the custom-house in the defendants' names would not make them liable; and *Roberts v. Holt*, *Artaza v. Smallpiece*, and the case of the *Theresa Bonita*, were cited in support of this objection. There was also another objection made, viz. that the plaintiffs had parted with their lien by landing the goods at the *West India* docks, and therefore there was no continuing lien at the time of the delivery to the defendants, the parting with which, where it still continues, may be a good consideration to raise an implied assumpsit to pay the freight, against the person in whose favour the lien is relinquished. Lord *Ellenborough*, Ch. J. upon the last objection stated to the jury, that as the goods were removed out of the ship, and deposited at the *West India* docks by act of law, he was of opinion it ought not operate to the prejudice of the plaintiff's lien, which therefore still subsisted; and upon the first objection he left the question to the jury, whether the defendants had promised to pay the freight in consideration of the plaintiffs having waved their lien, which pro-

mise his Lordship was inclined to think might be implied from the circumstances. The jury found a verdict for the plaintiffs.—The case afterwards came before the court in last *Michaelmas* term, upon a rule nisi, which had been obtained in *Easter* term for a new trial, when the objections above stated were more fully considered.—Lord *Ellenborough*, Ch. J. There is certainly one circumstance in this case which forms a material distinction between this and the case of *Cock v. Taylor*, and which seems to influence the judgment of my brethren, and therefore I should wish the case to go to a new trial, in order to enquire into the fact on which that distinction is founded, and then, if it should be deemed necessary, to consider farther of that distinction. The circumstance is this, that in *Cock v. Taylor* the goods were delivered under the bill of lading only; here they were delivered to the defendants, who were entitled to have them under the bill of lading, and might have enforced their delivery under it, and from whom they might have been withheld until the freight was satisfied: but it is said they obtained possession of them under an order for delivery from the consignees, which imports that the consignees still continued the proprietors, and not under the bill of lading, although they were indorsees of the bill of lading at the time. Then the question is, can the law extend the lien as against persons who do not claim in that character under which they would be liable for freight, viz. as indorsees of the bill of lading, but as the agents of the consignees, so as to make the parting with the lien to them a ground of consideration for an implied assumpsit by them to pay the freight? That would be carrying the law one step farther than was done in *Cock v. Taylor*, and in a case of lien we should be anxious to tread cautiously and on sure grounds before we extend it beyond the limits of decided cases. It struck me at the trial that the defendants, being indorsees of the bill of la-

ding, if they took the benefit derived under it, not having renounced their claim as such indorsees, must be considered as taking under it, and chargeable according to the terms of that instrument, which was essential to their title and which gave them the means of enforcing the delivery; but what weighs with the court is this, that they obtained the goods not by the strength of their title as indorsees, but as agents or servants of the consignees. The court therefore think it right that it should go down again in order to see if that fact can be varied.—*Grose, J.* There is a very material difference between this case and *Cock v. Taylor*. This appears to me to be a new case.—*Le Blanc, J.* It would be carrying the authority of *Cock v. Taylor* further than was intended or foreseen at the time when that case was decided, to hold that it governed the present. It is easy to raise an implied assumpsit where the parties are cognizant of the terms on which they are dealing, as where the dealing is between the owner or captain and the defendants, but it is not so easy where the dealing, as in this case, is between the owners and a third party, viz. *Williams and Wilson*, for I conceive that here the owners must be taken to have delivered the goods on the faith of *Williams and Wilson*.—*Bayley, J.* I think *Cock v. Taylor* was rightly decided. In that case the defendant received the goods as a purchaser of the bill of lading, making that his title to them, and virtually consenting that his name should be pledged to the owner for the freight; but here it seems to me the defendants never did consent to that, but standing in a situation in which the owners might have had their names pledged if they had claimed under the bill of lading, they adopted the alternative in which their names were not to be pledged to the owners. Instead of going with the bill of lading they go with the order of *Williams and Wilson*, and obtain a delivery under it, in their names, as the persons who were to

be pledged, and to whom the captain would consent to look for the freight. It strikes me, therefore, that *Williams* and *Wilson* are the only persons to whom the captain has a right to look : and that appears to be an essential distinction between the two cases.—*The Court* thereupon made the rule absolute for a new trial, and the cause went down again and was tried before Lord *Ellenborough*, Ch. J. at the *London* sittings in this term, when the same evidence was given as before, with this additional proof, that the defendants had upon former occasions obtained the delivery of other goods under similar orders from *Williams* and *Wilson*, on which occasions they had always paid the freight. Lord *Ellenborough*, Ch. J. then told the jury that the privity of contract under a bill of lading subsisted between the shipper of the goods and the captain; that the captain and his owners had a lien for the freight of such goods, not only whilst they remained on board the ship, but also in the *West India* docks; that such lien might be waved, or the goods might be delivered upon an understanding that the freight should be paid, in the same manner as if the goods had been retained for the lien; and that such an understanding might form a good consideration for a promise to pay the freight, which promise might be implied from the circumstances; that it was for the jury to consider whether from the former habit of dealing and the usage of trade they would imply such promise. The jury, as upon the former trial, found a verdict for the plaintiffs.—The *Solicitor-General* on this day moved for a new trial, insisting as before that as the defendants had obtained the goods under the order of *Williams* and *Wilson*, and not under the bill of lading, no privity could be inferred between the plaintiffs and defendants to raise an implied assumpsit between them; and that as the court had decided that the authority of *Cock v. Taylor* did not support the former verdict, so neither did it the

present.—*Lord Ellenborough, Ch. J.* If there were any point of law on which I entertained a doubt, I should be desirous of having the case reconsidered, but I am not aware that there was any point of law which could have been presented to the jury otherwise than it was. Then the question is, taking what has been the dealing between these parties and the general usage of trade, whether the defendants, who received these goods, must not be taken to have received them under the same terms that they had always adopted in other cases, viz. under the same liability to pay the freight as the original consignees were under. I left it to the jury to consider, whether from the evidence given of the general habit of dealing between the parties, these goods were delivered on an implied understanding that the same course was to be pursued with respect to them.—*Le Blanc, J.* This is not moved upon any question whether the law was properly stated to the jury, nor is it a question now, whether a person merely taking goods under an order for delivery, without any previous dealings of the same sort, would be liable for the freight; for the court intimated on a former occasion that he would not, and therefore sent the case down to a new trial, to ascertain whether, on account of any previous dealings between the parties, there was any understanding between them that the defendants should be liable for the freight. It now appears that the defendants uniformly paid the freight for the goods which they received on former occasions. Then the question is, whether the defendants, who appeared to act in the same character upon this as upon former occasions, and did not communicate that they were acting in a different character until after they had received the goods, were not to be understood as receiving them upon the same footing as before, i. e. upon an understanding that they would pay the freight. That was left to the jury, and they have found that there were such pre-

vious dealings, and from thence have implied the undertaking. There is no question of law to be considered; but the case, if sent down again, must be decided upon the same facts as now appear.—*Bayley, J.* The verdict is certainly according to the justice of the case. The defendants were in the habit of receiving goods and paying the freight for them, and when they received the goods in question, knew that the freight had not been satisfied. They could not have meant, then, in this particular instance, to turn the owners of the ship round upon *Williams* and *Wilson*, but must be understood as having agreed to pay the freight as upon former occasions, when the captain was used to send round to them for it; and they cannot be prejudiced by this, because they have got the goods.—Rule refused.

**STEVENSON v. BLAKELOCK, 1813, 1. MAULE & SELWYN, 535.**—Trove for an indenture of lease; there were two counts, one upon a conversion before the bankruptcy, laying the property in the bankrupt; another laying the property in the plaintiffs as assignees on a conversion after the bankruptcy. Plea, general issue. At the trial before Lord *Ellenborough*, Ch. J. at the *London* sittings after *Trinity* term, 1812, a verdict was found for the plaintiffs, subject to the opinion of the court upon the following case:—For some time before the month of *July*, 1809, the defendant had been employed by the bankrupt in various matters as his attorney and solicitor, and in that month, in consequence of a request from the bankrupt, made out his bill for the business so done, upon which a balance of 300*l.* appeared to be due to him; but neither that bill nor any other was ever delivered to the bankrupt. Upon being informed, however, of this balance by the defendant, the bankrupt requested him to draw bills upon him for the amount; and accordingly upon the 25th of

*August, 1809*, the defendant drew five several bills of exchange upon the bankrupt, which the bankrupt accepted, all dated on that day, and payable to the defendant's order, which bills were for the several sums, and payable at the several times following, viz. : one for 50*l.* at one month after date, due 28th *September, 1809*; another for 50*l.* at six weeks after date, due 9th *October, 1809*; another for 100*l.* at two months after date, due 28th *October, 1809*; another for 50*l.* at 70 days after date, due 6th *November, 1809*; and another for 50*l.* at three months after date, due 28th *November, 1809*. The two first of these bills were, before they became due, indorsed and delivered by the defendant to *W. and S.*, to whom he was indebted in the whole amount. When they became due they were dishonoured by the bankrupt, but remained in the hands of *W. and S.* at the time of the bankruptcy, and were proved by them under his commission. These bills, however, have since been taken up by the defendant, who has long ago discharged his debt to *W. and S.*, and the bills are now in his hands. The third bill for 100*l.* was also negotiated by the defendant to *C.*, to whom he was indebted; but this being likewise dishonoured by the bankrupt, was returned to the defendant for non-payment, and was taken up by him on the 29th *October, 1809*, and has ever since remained in his possession. The bankrupt, when he gave the bills, expressed some doubt whether he should be able to provide for the other two at the time when they became due, and requested the defendant not to circulate them, and therefore the defendant never parted with them, and they still remain in his hands, but they did not become due till after the bankruptcy. In *Trinity* vacation, 1809, three writs of *fiery facias* issued against the bankrupt, one at the suit of *Burrow* and others; and two at the suit of other persons; under which the sheriff took possession of the bankrupt's goods, and threatening to sell the same, the



bankrupt on the 31st *October*, 1809, advised with the defendant about paying the debts for which the execution had issued, and gave him 260*l.* for the purpose of satisfying that at the suit of *Barrow* and others; and on the following day the defendant paid to the solicitors of *Barrow* and others the 260*l.* in discharge of their debt, and those solicitors thereupon delivered to the defendant the lease in question, which had been deposited by the bankrupt with *Barrow* and others as a collateral security for their debt. Judgments on several cognovits being payable on the 6th of *November*, the bankrupt found it impossible to continue his business, and it was necessary for him to submit to a commission of bankruptcy, and the defendant thought it advisable for him so to do. On the 2d of *November* the bankrupt committed an act of bankruptcy, and a commission thereupon issued under which the plaintiffs have regularly been chosen assignees. The defendant not having before delivered his bill of costs to the bankrupt, after the bankruptcy delivered it to the assignees, but his demand upon the bankrupt and the assignees is confined solely to the 300*l.* before mentioned. The bankrupt was legally entitled to the lease in question, which is still in the possession of the defendant, and which was demanded of him by the plaintiffs before this action was brought, but he refused to deliver it.—The question for the opinion of the court is, whether, under the above circumstances, the plaintiffs are entitled to recover. If the court should be of opinion that they are, then the verdict to stand, otherwise a nonsuit to be entered.—Lord *Ellenborough*, Ch. J. The first question which arises on this case is, whether the defendant had a general lien as attorney attaching on the lease in question. Secondly, supposing such general lien would otherwise have attached, whether it is not precluded from attaching by the securities taken. The first impression on my mind was, that the general lien

would not attach. The lease did not appear to have come into the possession of the defendant as attorney in the ordinary course of business, but he appeared rather a mere bailee; but on further consideration the possession seems to us to have been acquired by the defendant in the course of his professional business. It was incident to his duty to do that for his client, which the client, if well advised, would have done for himself. It became his duty, therefore, upon discharging the debt due to *Barrow* and others to receive back the lease which was pledged as a security for that debt. On the receipt of it for his client, under these circumstances, it became not only the subject of particular lien, but also, as one of the papers of his client, subject to the general lien: We are of opinion, therefore, that the general lien attached. Upon the second question, whether the lien was gone in consequence of taking the securities, the argument for the plaintiffs rests principally on the case of *Cowell v. Simpson*, in which case the solicitors for the defendant had taken two notes, payable with interest three years after date, for the amount of their demand. The *Lord Chancellor* observed, that "the solicitor taking a security which has three years to run, as the client may have occasion for his papers, there is as much reason that the lien should not accompany the security through that period, as in the instance of a trade; and the conclusion is equally difficult, that the papers, if the client has occasion for them, could be withheld." The *Lord Chancellor* afterwards delivers his opinion, that "where these special agreements are taken the lien does not remain." I take the general rule of law to be, that where there is an express antecedent contract between the parties, a lien which grows out of an implied contract does not arise. But in the absence of any express contract, there may be a lien, and a right of action on an implied contract. In this case the attorney had a right of action on a *quan-*

*tum meruit*, and a lien, which was not affected by his forbearing to sue. The right of suit and right of lien are distinct rights, both arising out of implied contracts, and both subsisting at the same time. It is unnecessary to canvass the doctrine in *Cowell v. Simpson*, inasmuch as there is a material distinction between that case and the present; for there the bills were running, and there was no reason to presume that they would not be duly paid; in this case the bills have been refused payment. Assuming, then, the position of the *Lord Chancellor* to be correct, here there is the further circumstance of the bills being dishonoured; which places this defendant in his original situation as to lien. We are of opinion, therefore, that the defendant is entitled to a general lien.—Judgment of nonsuit.

BLAKE v. NICHOLSON, 1814, 3. MAULE & SELWYN, 167.—Trove for certain numbers or parts of a printed work, called *Dr. Hawker's Commentary on the Bible*. Plea, general issue. At the trial before Lord *Ellenborough*, Ch. J. at the *Middlesex* sittings after last term the case was this; the defendant, who was a printer, had been employed by *Stratford*, before his bankruptcy, to print several numbers, not all consecutive numbers, of the said work; of which he printed in the whole 8750 copies, and delivered to *Stratford* 5987, and the residue remained with him in his warehouse. *Stratford* supplied the paper for printing the several numbers from time to time as they were to be printed; and a separate charge was made by the defendant for the printing of each number, amounting in the whole to 494*l.* 2*s.*, of which *Stratford* had at different times paid 185*l.* on account. Afterwards *Stratford* becoming bankrupt, the plaintiffs, as his assignees, applied to the defendant for the delivery of the copies remaining in his hands, tendering to him so much as was due for the

printing of those copies, in proportion to his charge for the whole. The defendant refused to deliver them, insisting that he had a lien for the whole balance. His Lordship upon this evidence considered the work as one entire work, and directed a nonsuit.—Upon a motion for a new trial, *Lord Ellenborough*, Ch. J. I think the defendant had a lien for the whole balance, the work being an entire work in the course of prosecution, upon the same principle that a tailor, who is employed to make a suit of cloaths, has a lien for the whole price upon any part of them. It would be inconvenient if he was obliged to make stops in the course of the work; the nature of the work affords a reason for his general lien.—*Le Blanc*, J. The supplying the paper from time to time did not make it the less one entire work.—*Bayley*, J. He does a certain portion of one entire work.—Rule refused.

**BIRLEY v. GLADSTONE**, 1814, 3. MAULE & SELWYN, 205.—Where by charter-party the ship-owners covenanted to receive a full cargo, and the freighter to load the same, and to pay so much for every ton of flax, &c. which should be delivered at the king's beams at *L.*, and so much per diem for demurrage, and the parties mutually bound themselves, especially the ship-owners, the ship, her tackle, and appurtenants, and the freighter the goods to be laden and put on board, in a penal sum for the performance of every article contained in the charter-party: held that the ship-owners had not a lien upon the goods actually brought home to *L.* for a sum of money claimed to be due in respect of goods which were put on board at the loading port, but afterwards relanded, and restored to the agent of the freighter, under process of the law at the loading port, nor for a sum claimed for dead freight, nor for a sum claimed for demurrage.

**MESTAER v. ATKINS, 1814, 5. TAUNTON, 381.—**

This was an action for money had and received, brought to recover back a sum which the plaintiffs had paid upon compulsion to the defendant, as the only means to obtain from him the re-delivery of the certificate of registry and other papers of a schooner which had belonged to the bankrupt, and which had been deposited by him in the hands of the defendant, for the purpose of his selling the ship: the defendant had taken possession of the ship under a power of attorney from *Williams*, enabling him to sell her, and had incurred some charges in unsuccessfully attempting a sale, for which, as well as for some other sums, he claimed a lien on the ship's papers, which he had in his hands. Upon the trial, before *Gibbs, J.*, at the sittings after *Trinity* term, 1713, a verdict was found for the plaintiffs, subject to the question reserved, whether the defendant could have any lien upon a ship's papers, or whether it were not contrary to the policy of the register acts.

—*Heath, J.* All the cases decided have been cases of transfer, and cases where the ship might have been registered in performance of the contract; but in this case the party who had the papers could never have sent the ship to sea: his custody of the papers gave him no power over the ship.—Rule absolute.

**NATHAN v. GILES, 1814, 5. TAUNTON, 558.—**

*Gibbs, Ch. J.* I have gone through the facts of this case more at large than was necessary for disposing of the present rule, meaning to say a few words upon another point, which, if it were left wholly unnoticed, might lead to some misapprehension. It was strongly urged in the course of the argument, that *Nathans* had no property in the cargo, but only a lien upon it, until the bill of lading was indorsed to them. I do not enquire whether the fact was so or not; nor whether, if it were so, the plaintiffs could

or could not avail themselves of it upon these issues: but I am most clearly of opinion that if *Nathans* had a lien upon this cargo, and nothing more, no creditor of *Levin's* could attach it, or the produce of it, in their hands, or in the hands of those who held it for them, without discharging such lien. Without doing this, *Levin* himself could not have recovered it from them, nor from *Giles* and *Hennings*, who held it on their account; and they who attach property as *Levin's*, cannot have a larger right to it than he himself possessed before the attachment. Supposing, therefore, that in the interval between the delivery of this cargo to *Giles* and *Hennings*, on account of *Nathans*, and the indorsement of the bill of lading, *Nathans* had a mere lien upon it, still it could not be attached as the property of *Levin*, without discharging it from the lien.—Rule absolute.

WILSON v. HEATHER, 1814, 5. TAUNTON, 642.—Trover by the plaintiffs, as assignees of *Park*, a bankrupt, for a schooner. Upon the trial, before *Dallas*, J. at *Guildhall*, at the sittings after *Michaelmas* term, 1813, a verdict was found for the plaintiffs, subject to a case, which in substance stated, that the bankrupt *Park*, who resided in *London*, was the sole registered owner of the *Sea Nymph*, then belonging to and trading to and from the port of *London*, where she was duly registered. On the 9th *October*, 1812, the vessel sailed from *London* for *Gibraltar*; but, meeting with damage, put into *Portsmouth*, and was laid up in the harbour there. The bankrupt, in *December*, 1812, desired the defendant, who resided at *Portsmouth*, to sell the vessel; but there being no immediate sale for her, he applied to the defendant to give his acceptance for 200*l.* on the security of the vessel, which the defendant agreed, on the vessel being completely conveyed to him, to do, and to account for the difference,

in case she should be sold for a greater sum; and she would have been sold at any subsequent time if a purchaser could have been found for her. On the 6th *January*, 1813, the bankrupt duly executed a bill of sale of the vessel, and an indorsement on the registry was then duly made and executed by the bankrupt in the presence of two witnesses, and the certificate of registry, and bill of sale from the former owner to the bankrupt, were delivered by him to the defendant; and the defendant at the same time gave his acceptance for 200*l.* to the bankrupt, which was afterwards, and before the demand and refusal hereinafter mentioned, duly paid by the defendant. The vessel was, upon the execution of the bill of sale, put into, and had ever since remained in the defendant's possession, and had, from her arrival, lain in *Portsmouth* harbour, without being fitted out or employed in trading to and from that port. No copy of the indorsement so made on the certificate of the registry had ever been delivered to the persons authorised to make registry, and grant certificates of registry in the port of *London*; nor any entry thereof indorsed on the oath or affidavit on which the original certificate was obtained, nor any notice thereof given to the commissioners of the customs, nor any memorandum of the same made in the book of registry at the port of *London*, nor any copy of such bill of sale delivered to the persons authorised to make registry and grant certificates of registry in that port, nor any entry thereof indorsed on the oath or affidavit, nor any notice given of the same to the commissioners of the customs, nor had any registry *de novo* of the vessel been made at the port of *Portsmouth* or elsewhere. In *January*, 1813, *Park* became a bankrupt, and the plaintiffs were his assignees; who, before the action, duly demanded (but without tendering the 200*l.*) the possession of the vessel, which the defendant refused to deliver: he had no other claim on the vessel than for

the 200*l.* The bill of sale expressed that *Park*, in consideration of two hundred pounds to him paid by the defendant, had granted, bargained, sold, assigned, and set over unto the defendant, the schooner *Sea Nymph*, of *London*, described as having been a *Dutch* prize to a king's ship, the *Stately*, and duly registered, and setting out a copy of the certificate of such register, and setting out the bill of sale from the former owner, to hold the same schooner unto the defendant, his executors, &c. to his and their own use and uses, and as their own proper goods and chattels from thenceforth for ever. And the bankrupt covenanted for title, and for quiet enjoyment, subject nevertheless to the stipulations indorsed thereon; which were, that "it was understood that the within assignment was made and concluded as a lien or security to the defendant, for the within-mentioned 200*l.* advanced to the plaintiff upon that schooner; and that the defendant might lawfully make immediate sale, by public auction or private contract, of the schooner, and after concluding the same, execute as fully and effectually as the bankrupt might or could do, a regular, and lawful instrument or bill of sale to the purchaser, and forthwith pay over to the bankrupt such balance as should remain due to him after deducting the aforesaid advance, commission for selling, and other charges." This was signed by the bankrupt, and a receipt for 200*l.*, the consideration-money, was also indorsed.—*Gibbs*, Ch. J. This is an action of trover, by the assignees of a bankrupt, brought to recover a ship, to which the defendant makes title. He says, I claim only a lien, to retain her only till my debt is paid; and much confusion has arisen by a loose reference to the doctrine of lien. The right of lien does not arise out of any contract whatsoever, but out of a right to hold property till the party claiming the lien has been paid for the operation he performs. I think it has been held, that if a



person agrees to do the work for a specific sum, he loses his lien. This is a deposit for a sum lent on the ship: that is not strictly a lien. But it is said by my brother *Lens*, the agreement is, that the ship shall be retained till the 200*l.* is paid. Look at the evidence! What is it? An indorsement on the bill of sale states that the assignment is made or concluded as a lien or security to the defendant for the sum of 200*l.* advanced by him, and that the defendant should make immediate sale, and convey the vessel to a purchaser, and after repaying himself, pay over the surplus of the price. What agreement is to be inferred from that? Why, an agreement of mortgage, subject to redemption, on the money advanced being repaid. But, no doubt, until repayment the mortgagee would, by the terms of the bill of sale, have the full dominion and use of the ship. The intent of the register acts was, that no person might have the use of a ship, whose name might not be discovered by referring to some public document. But if all mortgagees might be taken out of the statutes, the statutes would become ineffectual. There can be no doubt, therefore, that if there be an instrument purporting to convey the ship to a lender for securing money, the instrument doing that must pursue all the requisites of the register acts. The doubt which arose on the case of *Rollerton v. Hibbert*, was, whether the act might not be evaded in consequence of that judgment, by a mere manual transfer of a vessel. To avoid that, the act 34 *Geo. 3.* was passed. There is no doubt, that there was an attempt in this case to transfer the ship, and that the requisites have not been complied with; and therefore all is void, which was intended to be done. My brother *Lens* says, admitting that, nevertheless the defendant has a right to hold the ship till the terms are complied with, (*viz.* of the payment of the money due to the defendant), on which the vessel was delivered. But I do not think those were the

terms on which it was delivered: we must find those terms in the bill of sale, which is an agreement of mortgage. Therefore the plaintiffs are entitled to recover.—*Heath, J.* I am of the same opinion. As to the doctrine contended for by the counsel for the defendant, it would repeal the whole of the ship-register acts. The calling it a lien, will not make it such. This is no lien; it is a pledge; and were we to make a pledge of a ship effectual, we should repeal the statute to all effects whatsoever. The mischief, as I understand, was, that before this act, a practice was prevalent, as old as the time of *Wm. 3.*, that foreigners purchased shares in *British* vessels, and traded to our colonies: to prevent that, it was enacted, that no transfer should take effect for any share in a vessel, unless all these particulars were specified, as directed by the statutes: but it would completely defeat the purpose of these statutes, if a foreigner, by advancing a sum of money by way of mortgage, might acquire a share in a ship, of which he might, as mortgagee, so long as he continued such, have the complete control to all intents and purposes.—*Chambre, J.* I am of the same opinion, for the reasons stated by my Lord, and Mr. Justice *Heath*.—*Dallas, J.* The case lies in a very narrow compass: the question was, whether this was a mere security for the debt due, or a transfer of the ship: this depends on the facts of the case. It is not a mere deposit for the sum advanced, but an agreement for the transfer of the ship. The proof is, that a bill of sale is executed: for what purpose, but to transfer the property in the ship? The indorsement shews it more strongly, reciting that the intent was, that the defendant should sell and convey the ship: how could he convey, unless he had the property in the ship? Although, therefore, I had some doubt at first, I have now none whatever, but that the plaintiff is entitled to recover.—  
Judgment for the plaintiff.

**MITCHELL v. SCAIFE, 1815, 4. CAMPBELL, 298.**—  
Trove for cotton and logwood. The defendant being part-owner of the ship *Cossack*, by a charter-party dated 9th May, 1815, let her for a voyage from *Liverpool* to *Jamaica* and back, to *Abraham Garnett*, who covenanted "to pay 3,300*l.* for the freight and hire of the said vessel for the said voyage, together with 5*l.* per cent. primage on the outward cargo, and the customary *West Indian* primages on the homeward cargo;" the said freight and primages to be paid as follows: "the sum of 300*l.* part thereof at the end of one month after the vessel sailed from *Liverpool*, by a bill on *London*, at two months' date; the sum of 300*l.* other part thereof to be advanced to the master of the said vessel in cash in *Kingston*; and the remainder to be paid on the delivery of the homeward cargo at *Liverpool*, by good and approved bills on *London* at three months' date." The ship sailed to *Kingston* in *Jamaica*, addressed by *Garnett* to *Hector Mitchell*, his correspondent, to whom he sent information of the charter-party, with instructions to purchase a homeward cargo for the ship on his account. *Hector Mitchell* accordingly purchased a homeward cargo on *Garnett's* account, and loaded it on board the ship. Of this he made out an invoice in the following form:—"Invoice of the cargo of the brig *Cossack*, *Hodgson* master, bound to *Liverpool*, shipped by order and for account of *Abraham Garnett*, and to him to be delivered when payment shall have been made for the same to *William Mitchell* of *London*." For this the master signed bills of lading deliverable "to the order of the shipper or to his assigns, he or they paying freight for the said goods at the rate of 2*d.* per lb. weight for cotton, and three guineas per ton for wood, with average accustomed." *Hector Mitchell* being a creditor of *Garnett* to more than the value of the cargo, and being afraid of his solvency, transmitted the indorsed bills

of ladings to his brother *William Mitchell*, of *London*, the present plaintiff, and at the same time drew bills of exchange upon him for the amount of the cargo, instructing him as soon as these bills of exchange were provided for by *Garnett*, to hand over to him the bills of lading. *Garnett* soon after became insolvent, and the plaintiff himself paid the bills of exchange. There was no evidence that he had any notice of the charter-party. Upon the arrival of the *Cossack* at *Liverpool*, he demanded the goods, and tendered the full amount of the freight due by the bills of lading, which, though according to the current rate of freight at the time, did not nearly amount to the sum due by the charter-party. The defendant insisted that he had a lien on the goods for this latter sum, and refused to deliver them up till it was paid.—Lord *Ellenborough*. Upon the facts proved I am of opinion that the shipowner had no right to detain the cargo for more than the freight mentioned in the bill of lading. The plaintiff is the *bonâ fide* indorsee of the bill of lading, and having paid the bills of exchange, must be taken to be the purchaser and owner of the cargo. He is in no degree connected with any fraud upon the charter-party. He receives the bill of lading, by which the master agrees that the goods shall be delivered to him, on payment of a certain specified freight. He knew that this is an instrument which the master has in general authority to sign, and he seems to have had no reason to suspect that this authority was not properly exercised upon that occasion. Under such circumstances, I am of opinion, that the owner of the ship cannot be heard to aver against the contract created by his own agent through the medium of the bill of lading. The plaintiff had a verdict.

WESTWOOD v. BELL, 1815, 4, CAMPBELL, 349.—  
This was an action of trover for a policy of insurance.

In the month of *September*, 1814, the plaintiff, a merchant at *Leeds*, directed Messrs. *Hebden*, his agents there, to procure two policies of insurance to be effected for him in *London*,—one upon woollens by the ship *Sally*, from *Hull* to *Seville*, for 896*l.*, and the other on similar goods by the ship *Speculation*, from *Hull* to *Gottenburgh*, for 1000*l.*—Messrs. *Hebden* ordered their insurance-brokers, Messrs. *Robinson and Son* of *London*, to effect these policies. Messrs. *Robinson and Son* soon after receiving this order, informed Messrs. *Hebden* that they had effected these two policies, and transmitted to them the copies of two policies which purported to have been effected by Messrs. *Robinson and Son* in their own names accordingly, at the same time debiting them with the amount of the premiums. Messrs. *Hebden* immediately communicated this information to the plaintiff, and gave him the copies of the policies. Messrs. *Robinson and Son* in truth had not effected the policies, but, without the knowledge of the plaintiff or of Messrs. *Hebden*, they had directed Mr. *Clarkson*, a merchant in *London*, who occasionally acts as an insurance-broker, to effect them. Mr. *Clarkson*, instead of effecting them himself, wrote the following letter to the defendants, who are regular insurance-brokers:

“ *London*, 19<sup>th</sup> *September*, 1814,

“ Messrs. *Bell and Wilkinson*.

“ Gentlemen,

“ Please insure for me per the *Sally*, *Jones*, from *Hull* to *Seville*, on 7 bales woollens, as at foot, 666*l.*; also 230*l.* more on goods, making together 896*l.*, at 6 guineas per cent. to return 40*l.*; and per *Speculation*, *Mohlin*, from *Hull* to *Gottenburgh*, on woollens 1000*l.*, at 1½ guineas per cent. *John Clarkson*.” “The *Speculation* sailed 10<sup>th</sup> instant, and the *Sally*, I believe, was ready to sail on the 13<sup>th</sup> instant.”—The defendants immediately effected the policies in their own names “as agents,” and

debited *Clarkson* with the premiums. The *Speculation* arrived safe at her port of destination. The *Sally*, with the plaintiff's goods on board was lost in the voyage insured. Both policies remained in the hands of the defendants. Before the commencement of this action the plaintiff tendered them the sum of 77*l.* 3*s.* 9*d.* being the amount of the premiums, commission, and charges on the policies, and required them to deliver up the policy for 896*l.* on woollens by the *Sally*. This the defendants refused to do, claiming a general lien on the policy for the balance due to them from *Clarkson*, which then amounted to 215*l.* 11*s.* 9*d.*—*Gibbs*, Ch. J. I am of opinion that the action cannot be maintained. I hold that if a policy of insurance is effected by a broker, in ignorance that it does not belong to the persons by whom he is employed, he has a lien upon it for the amount of the balance which they owe him. In this case *Clarkson* has misconducted himself, and is liable for not disclosing that he was a mere agent in the transaction; but the defendants, who had every reason to believe that he was the principal, are entitled to hold the policy. If goods are sold by a factor in his own name, the purchaser has a right to set-off a debt due from him, in an action by the principal for the price of the goods. The factor may be liable to his employer for holding himself out as the principal; but that is not to prejudice the purchaser, who *bonâ fide* dealt with him as the owner of the goods, and gave him credit in that capacity. The lien of the policy-broker rests on the same foundation. The only question is, whether he knew or had reason to believe that the person by whom he was employed was only an agent; and the party who seeks to deprive him of his lien must make out the affirmative. The employer is to be taken to be the principal till the contrary is proved. If the plaintiff's assent to the employment of *Clarkson* is denied, then he can have no right,

to the policy, and there is no privity between the parties. The argument about pledging the policy is fallacious. This never was a policy of the plaintiff's which he held unincumbered and handed over to his agent. In its very origin and creation it was burthened with the lien. It never has been the plaintiff's for an instant but subject to the lien which is now claimed. The rights of the parties do not stand on the same footing as if *Clarkson* had said he had authority to pledge the policy, but as if he had said, "the goods to be insured are mine, the policy is for my benefit alone, and I agree that when it is effected, it shall remain in your hands till the whole of the balance I owe you is satisfied; and on the strength of it you will continue to trust me." If that had passed, can I say that the defendants are to be stript of their rights, on account of a fact of which they had no knowledge, and that they are to deliver up to a stranger the policy which they have effected under a contract that they should hold it as a security for the balance due to them from their employer? Nor do the cases cited on the part of the plaintiff at all contradict the doctrine I am laying down. In *Snook v. Davidson*, the person who employed the defendants to effect the policy, said that it *was for a correspondent in the country*. In *Lanyon v. Blanchard*, likewise, the defendant must be taken to have had notice that the person who employed him was not the principal. The representation made by *Crowgy*, that he had authority to indorse the bill of lading, was abundantly sufficient to shew that he was only an agent, and I entirely subscribe to what Lord *Ellenborough* is there supposed to have laid down respecting the risk which the defendant run in giving faith to that representation. The subsequent case of *Mann v. Forrester* is quite decisive. The doctrine stands upon authority as well as upon principle. I should have had no difficulty in determining the question, were it entirely new; and I find my-

self strongly fortified by the opinions of other judges.—  
The plaintiff must be nonsuited.

**POTHONIER v. DAWSON, 1816, 1. HOLT, 383.—**  
This was an action of trover to recover some wine which had been deposited in the defendant's cellar. The circumstances were these: *Pothonier*, being in want of money, applied to the defendant to advance him some, and proposed to deposit 200 dozen of wine in her hands. This wine was to remain as a security for the money advanced. It was agreed that the plaintiff should be at no expense for warehouse-room, and should have the wine re-delivered upon satisfying the loan. The wine having been deposited, and bills accepted by *Pothonier* for the money advanced, the plaintiff, a few months afterwards, took in the co-plaintiff, *Hodgson*, as his partner. The wine remained in the defendant's cellars: and it appeared that the plaintiffs, in two or three instances, had sent for a portion of this wine to the defendant, and that some dozens had been delivered out to the joint order of *Pothonier* and *Hodgson*. The bills which *Pothonier* gave were not paid, and he became insolvent. Afterwards *Hodgson*, in their joint names, applied to the defendant for the wine, which she refused to deliver, and sold to reimburse herself.—  
*Gibbs*, Ch. J. The defendant is entitled to a verdict. Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But when goods are deposited, by way of security, to indemnify a party against a loan of money, it is more than a pledge. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade. These goods were deposited to secure a loan. It may be inferred, therefore, that the contract was this:—"If I (the borrower) repay the money, you must re-deliver the goods; but if I fail to repay it, you may use the security I have left to repay yourself." 1.



think, therefore, the defendant had a right to sell. There is no fraud practised upon *Hodgson*; and the delivery of a few dozen of wine to the joint order of *Pothonier* and *Hodgson* cannot be strained into a renunciation of the defendant's property in the wine, and an admission that she held it for both.—Verdict for the defendant.

**HUTTON v. BRAGG, 1816, 7. TAUNTON, 14.**—In trover for 70 pipes of wine, averred to be the property in the first count of the bankrupt, in the second of the plaintiffs as his assignees; at the sittings after *Michaelmas* term, 1815, at *Guildhall*, before *Dallas, J.*, a verdict was found for the plaintiffs subject to a case. The plaintiffs were the assignees of *J. Strombom*, who committed an act of bankruptcy on 5th *May*, 1815, and against whom on 25th *August* a commission issued. The defendant on 30th *September*, 1814, chartered his ship, the *Neptune*, to the bankrupt for a voyage from *London* to the *Cape of Good Hope*, where after delivering the outward cargo, she was to take in another for *London*, the master having liberty to reserve the cabin for his sole use, and the usual accommodation for his crew and ship's stores; and seventy running days being allowed for loading and discharging the homeward and outward cargoes: the bankrupt covenanted to pay the defendant or his assigns freight for the voyage out and home, 2100*l.*, with 5 *per cent.* *primage*; to be paid, one-fourth thereof by bills on *London* at two months, one-fourth by like bills at four months from clearing out from the custom-house of *London*, one-fourth by government or approved bills on *London* within 10 days after discharging the cargo at the *Cape*, and the remainder by bills at three months from the vessel being reported inwards at the port of *London*: the freighter had liberty to keep the ship on demurrage — days, paying 3*l.* 13*s.* 6*d.* per day in *London*, and 7*l.* 7*s.* abroad; and for the due perform-

ance of the charter-party the owner bound the vessel and her freight, and the freighter bound the goods to be laden on board her. The ship cleared out from *London* on 29th *October*, 1814, addressed to *Reynolds and Murray*, the bankrupt's correspondents at the *Cape*. On 16th *March*, 1815, she arrived there, and on the next day was reported to *Reynolds and Murray*, and at the custom-house: on 16th *April* she completed her discharge of the outward cargo, on 18th began to take in her return cargo, and on 12th *May* completed it: on 16th *May* she cleared from the *Cape*, on 8th *August* arrived in *London*, and was reported inwards at the custom-house; and on 25th *August* finished the discharge of her homeward cargo. The return cargo consisted of goods of various persons, (for which the master signed the usual bills of lading, deliverable to them on paying freight to the bankrupt's order,) and of the 70 pipes of wine in question, which were shipped by *Reynolds and Murray*, on the bankrupt's account, and consigned to him; of which 18 pipes were loaded on 3d *May*, 14 more on 5th, and 38 on 8th *May*; and all of them were, by bills of lading dated 19th *May*, made deliverable to order or assigns, on payment of freight to the order of the shippers, as *per* indorsement; and the bills of lading were indorsed to the order of the bankrupt. Some of the goods were loaded in the cabin and steerage of the ship, reserved by the charter-party, the freight of which, agreeably to the bills of lading for them, amounted to 60*l.* 5*s.* 1*d.* On 2d *November*, 1814, the defendant drew two bills on the bankrupt for 551*l.* 6*s.* each, being each one-fourth of the freight and primage, at two and four months' date respectively, payable to the order of the defendant, which the bankrupt accepted. The master of the *Neptune* received from *Reynolds and Murray*, as the bankrupt's agents, at the *Cape*, another sum of 551*l.* 5*s.*, being one other fourth of the freight and primage. For

the remaining one-fourth no payment had been made or bill given. The two bills, dated 2d *November*, were presented for payment when due, and dishonoured. When the first of them, viz. at two months' date, became due, it then and still was in the hands of *Heath* and *Hawkins*, who had discounted it for the defendant, and who, on its being dishonoured, debited the defendant with the amount, and at the instance of both the plaintiff and the defendant, agreed to hold the bill. Previous to the second of those bills, viz. that at four months, becoming due, it was arranged between the defendant and the bankrupt, that two other bills for 551*l.* 5*s.* each, should be drawn by the defendant, and accepted by the bankrupt; that the defendant should negotiate such bills, and that out of the moneys he would raise by so doing, the original bill at four months should be retired. In pursuance of such arrangement, two other bills, one at six months' date from 2d *Dec.* 1814, and the other at five months' date from 3d *March*, 1815, each for 551*l.* 5*s.* were drawn upon, and accepted by the bankrupt; and out of moneys raised on those bills, the defendant paid the original bill at four months, and delivered it over to the bankrupt, and the same was now in the possession of his assignees. The bankrupt also drew on the defendant two bills amounting together to 531*l.* 14*s.*, viz. one for 300*l.* at nine months, and one for 231*l.* 14*s.* at 12 months, from 1st *March*, 1815, which were accepted by the defendant, and which were considered as the balance due from the defendant to the bankrupt in respect of the two last-mentioned acceptances of 551*l.* 5*s.* each, after satisfying the original bill at four months, difference of the interest, and charges. The bankrupt's two last-mentioned acceptances for 551*l.* 5*s.* each, at five and six months' date, were also dishonoured: the former was taken up by, and was now in the hands of the defendant, the latter was outstanding, as well against the defendant, as

against the bankrupt. On 8th *August*, 1815, the defendant caused the 70 pipes of wine to be landed out of the ship, and entered in his own name in the *London* docks. Previously to the commencement of this action, the plaintiffs had demanded the wine, and at the same time tendered to the defendant 70*l.* 10*s.* in satisfaction of any lien or demand he might have on them; the defendant contending that he had a lien for the outstanding acceptances, and also for the cabin and steerage freight, and the demurrage, as well as for the last fourth part of the freight and primage, or an approved bill for the amount, and that, at any rate, the tender made him was not equal to the lien upon the wines, refused to deliver them. The amount of the demurrage and detention, supposing the detention taken at the same rate as the demurrage specified in the charter-party, was 257*l.* 6*s.*; the specified demurrage was 147*l.* If the court should be of opinion that the plaintiffs were entitled to recover, the verdict was to stand, the plaintiffs undertaking to pay such part of the 70*l.* 10*s.* as the court should determine the defendant's lien to amount to. If otherwise, a nonsuit to be entered.—*Gibbs*, Ch. J. It will not be necessary for me to enter into the consideration of the difference between the goods loaded before, and those loaded after the act of bankruptcy, nor to consider the question, inasmuch as some of the goods were delivered on the day of the bankruptcy, whether of those two acts preceded the other. We decide on a general ground. On the question, whether there be or be not any lien whatever in the defendant, the plaintiff contends that the defendant has no lien, on one particular, and one general ground; he insists, on the authority of a case in *Buller's Nisi Prius*, that wherever there is a specific agreement for the price of the thing to be done about the goods, there the party has no lien; that here, by the charter-party, a specific sum is to be paid in a specific manner,

and that therefore no lien exists. With respect to that proposition, it is not true that a lien cannot exist where there is a stipulation for a particular sum to be paid for that which is to be done about goods. I am not prepared to say whether a lien may, or may not exist, in a case where not only a specific sum, but a specific mode of payment is stipulated for, as for example, by bills payable at certain periods. We decide on the more general ground, that there is no lien whatever under the circumstances of this case. The defendant is the owner of a ship, the bankrupt is the charterer of the ship; and for one sum of £100*l.* to be paid at different periods, he was to have the whole use of this ship for the voyage out to the *Cape of Good Hope*, and home to *London*. It is clear that he might have put this up as a general ship, have filled her with the goods of other persons, and when they come home, the defendant could not have touched those goods by way of detaining them till his freight was paid him by the charterer. But here, it is contended, inasmuch as these are the goods of the charterer put on board by himself, the defendant might detain these goods till those dishonoured bills were paid by the charterer. He could not have had this right, unless he had a lien on the goods: he could not have a lien on the goods, unless he had in some sort the possession of the goods: here, he had no possession of the goods whatsoever. No case is produced, that bears directly on the subject, and we must consider the case on principle. If *Parish v. Crawford* had stood unimpeached, I should have thought it a strong authority, that the possession of the chartered ship remained with the owner, because of his liability to those who put their goods on board. It certainly was there held, that one who put his goods on board by the consent of the charterer, might recover for the loss of the goods, not against the charterer, by whose authority he loaded them, but against the owner.

But that case has frequently been questioned, and in two cases formally overruled. I therefore attribute no weight to that case. It is well known that an owner cannot be guilty of barratry. In a case before Lord *Mansfield*, Ch. J. a question arose on an insurance cause, whether the charterer could commit barratry; and it was held that he was the owner of the ship for the voyage, and being such, he could not commit barratry in any other character. In the present case the consignor is a bankrupt: he was the owner of this ship for the voyage. He puts his own goods, then, on board his own ship, and the master and crew ought to have obeyed his orders for the voyage. Lord *Hardwicke*, Chancellor, in *Paul v. Birch*, says, "the sum reserved is improperly termed freight, for it is rather for the hire of the ship." It is, indeed, more like rent than freight. If, then, the bankrupt be owner for the voyage, and if it be the duty of the master and crew to obey the owner's instructions, when the bankrupt puts his own goods on board his own ship, the master and crew ought to obey him until the voyage is ended, which is not until a full delivery is made of the goods; and until that time the possession of the ship does not revert to the owner. I am therefore of opinion that the plaintiff is entitled to his judgment.—*Dallas*, J. If in this case it were necessary to pronounce an opinion upon the several points which have been argued at the bar, I, for one, should be solicitous to take more time to look into them. But where several grounds are taken in a case, some of which are doubtful, but others clear, if the case can be decided on the latter, it is unnecessary to go into the former. I agree with my Lord that there is in this case no possession in the defendant, and there can be no lien, unless there is a possession. It may be considered that the charterer of a ship is during the existence of the charter-party to all intents and purposes the owner of the ship:

the bankrupt had put these goods on board in that character, and the defendant had no legal right to resume the possession of the ship until the goods were unloaded, and therefore he had no right to detain the goods.—*Park, J.* It is unnecessary, for the reasons assigned by my Lord Chief Justice, for me here to enter into the questions made at the bar. The first question is, then, whether the defendant had any possession of the goods? for, if he had no possession, he had no lien. On the first day of the argument the judgment of *Lee, Ch. J.* in the case of *Parish v. Crawford* was cited. In *James v. Jones* it was not necessary to overrule it in terms, but the last-mentioned judgment is wholly inconsistent with the former case. In *Mackenzie v. Rowe*, Lord *Ellenborough* also, on consideration, differs from *Parish v. Crawford*. In a subsequent case, *Fraser v. Marsh*, the point was not the same, but the attention of the court was called to *Parish v. Crawford* and *James v. Jones*, and the court decided adversely to the former case; for these reasons I am of opinion with my Lord and my brother *Dallas*, that in this case there ought to be—Judgment for the plaintiff.

GLADSTONE *v.* BIRLEY, 1817, 2. MERIVALE, 401. The court of K. B. having determined, “that the ship-owners had not a lien upon the goods brought home, for money claimed to be due in respect of goods put on board and relanded, nor in respect of dead freight, nor in respect of demurrage,” the present bill was filed by the defendants at law, for the purpose of obtaining a declaration that the ship-owners were entitled to a lien in equity by virtue of the clause in the charter-party.—The *Master of the Rolls*. The question in this case is, whether the last clause in the charter-party can have any different effect in equity from what it has been determined to have at law? The clause is this—“And, lastly, for the true performance

of every article, matter, and thing herein contained, the parties hereby mutually bind and oblige themselves, especially the owners, the ship, her tackle, and appurtenances, and *Holt* (the freighter) the goods and merchandizes to be laden and put on board the same vessel on the said voyage, each unto the other and others of them, in the penal sum of 3000*l.* sterling, to be forfeited and paid by the party delinquent, to the party observant, to the true and punctual performance thereof." It has been decided at law, that this gave the present plaintiffs no lien on the goods brought home in the ship, either for what is called the dead freight, or the demurrage that became due by virtue of the covenants on the part of the freighter. The ground of the judgment was not, as I understand the report, that such a lien might not have been contracted for, but that the clause did not contain a contract to that effect. Mr. Justice *Le Blanc* says, "The clause could not mean to give the ship-owners a lien: if such had been its intention, it might easily have been expressed in a very few words, that the ship-owners should have a right to detain the goods which should be brought home, until all their demands under the covenants were satisfied." Now there can be but one right construction of the clause; and, if it could be said that the Court of *King's Bench* had ill construed it, this is not a court of appeal in which their decision can be corrected. The plaintiffs however suppose, that although a court of law has said that the clause does not give them a lien, a court of equity may say that it gives them what is precisely tantamount to a lien, namely, a right to have their demand satisfied out of the produce of the goods in preference to any other creditors of the bankrupt freighter. Putting this clause out of the question, it was not contended that equity gives the ship-owner any lien for his freight beyond that which the law gives him. There are, to be sure, liens which exist only in equity, and of which



equity alone can take cognizance: but it cannot be contended that lien for freight is one of them. As to liens on the goods of one man in the possession of another, I know of no difference between the rules of decision in courts of law, and in courts of equity. The question that so frequently occurs, whether a tradesman has a lien on the goods in his hands for the general balance due to him, or only for so much as relates to the particular goods, is decided in both courts in the same way, and on the same grounds. To extend the lien, the party claiming it must shew an agreement to that effect, or something from which an agreement may be inferred,—such as a course of dealing between the parties, or a general usage of the trade. Lien, in its proper sense, is a right which the law gives. But it is usual to speak of lien by contract, though that be more in the nature of an agreement for a pledge. Taken either way, however, the question always is, whether there be a right to detain the goods till a given demand shall be satisfied. That right must be derived from law or contract. A court of competent jurisdiction has decided that neither law nor contract has, in this case, given any such right. And, without directly contradicting that decision, it is impossible for me to say that the plaintiffs have a right to be first paid out of the produce of the goods; for, if they had any such right, they would also have had a right to retain possession till they were paid. It was asked, what effect the clause could have if it gave no lien either in law or equity. A court of equity is not bound to find an equitable effect for a clause, merely because the construction which a court of law has put upon it would leave it inoperative. In truth, it has been copied from foreign charter-parties, with very little consideration of the effect that might be allowed to it by the law of this country. I think it very probable that, in other countries, it would have the effect of entitling the ship-owner to retain the

cargo for every sort of demand that could accrue to him under the charter-party. If that be not the effect of it, I do not see what other it can have. But, bound as I am by the construction which it has received from a court of law, and conceiving that this is not a case in which equity can give a lien that does not legally exist, I must dismiss the plaintiff's bill.—Bill dismissed without costs.

LUCAS v. DORRIEN, 1817, 7. TAUNTON, 278.—This was an action of trover for certain sugar and molasses, and for an indenture of lease. The declaration contained counts, laying the possession in the bankrupt before his bankruptcy, and in the plaintiffs, as his assignees, afterwards. The defendants pleaded the general issue. The cause was tried at the sittings at *Guildhall*, after *Trinity* term, 1816, before *Gibbs*, Ch. J., when the jury found a verdict for the plaintiffs, damages 12,000*l.*, subject to a case. On 4th *February*, 1814, the bankrupt applied to the defendants, who were his bankers, to advance him 10,000*l.* upon his note of hand, and the collateral security of certain sugars, then lying in the warehouses of the *West India Dock Company*, and at other places. The defendants, being satisfied with the proposed security, agreed to advance the 10,000*l.*, whereupon a note of hand for that sum was drawn, and signed by the bankrupt, and delivered to the defendants, together with the dock checks for such sugars, which were all duly indorsed by the bankrupt, and the defendants thereupon advanced the 10,000*l.* Of such sugars, part were afterwards sold by mutual consent, and the net proceeds thereof placed to the credit of the bankrupt's banking account with the defendants; and other parts thereof were, at the bankrupt's request, exchanged for certain quantities of molasses, then lying also in the Dock Company's warehouses; and the dock checks for such molasses were in like manner indorsed by the bankrupt, and delivered to the defendants. The bankrupt's said

note of hand fell due on the 11th *February*, 1815, but it not being convenient to him then to pay it, the defendants, at his request, agreed to continue their said advance for one month longer, upon the bankrupt's renewed note of hand for the like sum, and the collateral security of certain sugars and molasses to be specified on the back of such renewed note. On the 23d *February*, a note of hand of that date, for payment to the defendants of 10,000*l.* at one month after date, value received, with interest, and expressing that certain sugars and molasses, as specified on the back, were left as a collateral security, (the numbers, marks of the cask, and other description whereof, were indorsed on the note), was accordingly drawn and signed by the bankrupt, and delivered to the defendants, together with the dock checks for the last-mentioned sugars and molasses, which checks were all duly indorsed by the bankrupt. The only matters in dispute were the hogsheads, casks, and barrels of molasses, referred to in the four dock checks, whereof copies were annexed to the case,\* and

\* The form of one of these dock checks, for which printed blanks are prepared and kept by the Dock Company, is given below :—

“ This is to certify, that the undermentioned order, for goods deposited in warehouse No.      of the *West India Dock Company*, has this day been lodged with me.

No. of Order.	Marks of Lots.	Description of Goods.	Ship.	Master.	By whom granted.	In whose favour.
1192 and 3	M A 17 E 31	52 Casks Molasses.	William.	Lintclater. Entd. July, 1813.	T. Kemble & Co. and G. Dorrien & Co.	G. Ackland & Co.

Given under my hand this 4th *Feb.* 1814.

*West India Dock House,*

(Signed) *J. T. Hamilton*, Clerk.

N. B. To prevent delay, parties lodging orders for the delivery of

also the lease mentioned in the plaintiff's declaration. On the 2d *March*, 1815, the bankrupt suspended his payments in business, which circumstance was not known to the defendants until the 4th, when they were informed thereof by the bankrupt's attorney. On 7th *March*, the defendants applied at No. 3. Dock warehouse, and produced two of the checks so deposited by the bankrupt, one for 51 hogsheads, the other for 19 barrels; which checks, with their indorsements, were examined by the warehouse-keeper, who, after comparing them with the company's books, said that they were sufficient for the delivery of the molasses. The duties on the 19 barrels of molasses being paid, they were delivered to the defendants on the 19th of *March*, but the duty on the 51 hogsheads not being paid, they remained in the warehouses. On 7th *March*, the defendants' clerk likewise applied at No. 6. warehouse, producing two more of the dock checks, one for 129 casks, the other for 20 casks of the molasses, which checks were in like manner examined, and compared by the warehouse-keeper, who also said that they were sufficient for the delivery of the molasses; but the duties on the 129 casks and 20 casks not being then paid, the delivery of them was not required, and they remained in the warehouse. On the same day, the defendants' clerk applied at No. 10 warehouse, producing another of the dock checks for 52 casks of the molasses, which check being examined and compared by the warehouse-keeper, he answered, that he had no objection to the delivery of the molasses. The duties on 35 casks (part of the 52 casks) were paid on the 9th; and on that day, the 35 casks were delivered to the defendants. On the 10th *March*, the duties were paid by the defendants on 80 casks, (part of the 129 casks,) and on the

goods, at the Dock House, are desired to present at the same time this check filled up, and ready for insertion of the number of the order, and the clerk's signature, which will greatly promote dispatch.

following morning, 11th *March*, the defendants sent carts to fetch these away; but the delivery of them was refused, the clerk, who was sent to receive them, being told, that a commission of bankrupt had been issued against *Doorman*, and that no more of the molasses would therefore be delivered without the consent of the assignees. No application was ever made by the defendants to obtain a rehousing of any of the sugars and molasses, of which the dock checks were so indorsed, and delivered to them on the 4th *Jan.* and 23d *Feb.* 1815, nor was any part of such sugar and molasses transferred into the defendants' name in the books of the *West India Dock Company*, but the whole stood and remained in the name of the bankrupt. Some months previous to the 10th of *March*, 1815, the bankrupt applied to the defendants with the lease mentioned in the declaration, and requested them to advance him money on the security thereof, which they declined. But the bankrupt left the lease with the defendants, without making any declaration of the purpose for which the same was so left, and the lease remained in the possession of the defendants, loose, and uninclosed in any cover, from that time, down to the issuing of the commission, and afterwards. On the 10th *March*, 1815, a commission of bankrupt was duly awarded and issued against *Doorman*, on an act of bankruptcy committed by him on 8th *March*, but of which act of bankruptcy the defendants had no knowledge, nor had received any information thereof, until after the issuing the commission, and on 10th *March* a provisional assignment was made to *J. Billing*, who on the same day gave notice to the *West India Dock Company* of such commission and assignment. On 25th *March*, an assignment was made to the plaintiffs; on 26th *March*, the bankrupt's said renewed note for 10,000*l.* fell due, and was not paid, nor has the amount thereof been since reduced, save as hereinafter mentioned. In pursu-

ance of a mutual agreement between the parties, the lease has been sold by the plaintiffs for the net sum of 1218*l.*, and the molasses by the defendants, for the net sum of 1144*l.* 2*s.* 5*d.*, which sums are to be accounted for by the parties respectively, according as the verdict shall be finally settled in the above cause. At the time of issuing the commission, there appeared upon the face of the bankrupt's banking account with the defendants, to be a balance 866*l.* 1*s.* in favour of the bankrupt; but in such account was not included the amount of the bankrupt's unpaid note of 10,000*l.* of the 23d *February*, 1815, so received by them as aforesaid. After debiting the banking account with the unpaid note of 10,000*l.*, and with certain payments since made by the defendants, and after crediting it with monies since received by them in respect of the said collateral securities, there was and is a final balance due to the defendants from the bankrupt's estate of 3,499*l.* 1*s.* 11*d.* for which balance, or any part thereof, they held no security whatsoever, nor did they possess any claims in respect thereof, other than their claims upon the net proceeds of the lease, and the dividends which might be payable under the commission in respect of their final balance, or of some part thereof, the net proceeds of the molasses so sold by them under the said agreement, being comprehended in the said final balance of 3,499*l.* 1*s.* 11*d.* The molasses and lease in question having been disposed of by mutual consent, prior to the commencement of the action, such disposition thereof was to be considered as equivalent to a demand and refusal. The questions for the opinion of the court were, whether the plaintiffs were entitled to recover for the molasses, or any and what part thereof, in this action; and whether they were entitled to recover for the lease. If the plaintiffs were entitled to retain the verdict, the amount of the damages was to be settled according to the rule which the court should pronounce. If not, a non-

suit was to be entered.—*Dallas, J.* The facts are, that the bankrupt applies to the defendants, who are bankers, to discount for him a note for 10,000*l.* on the security of these sugars, and they receive an assignment of the dock warrants. The defendants are unable to pay, and the bankers consent to renew the note for another month: an act of bankruptcy takes place on the 8th of *March*: notice of the transfer was given to the Dock Company on the 7th, the day before the bankruptcy. If, therefore, there was any complete delivery, there was a delivery to the defendants before the bankruptcy. And there is this further fact: the clerk of the Dock Company, on the dock warrant being exhibited to him, says, "this will suffice." Therefore I must take it, that the Dock Company, through their agent, had notice of the transfer; and though nothing was done in consequence of that notice, yet it falls within the case in *Campb.* where Lord *Ellenborough* held, that the mere giving notice to the wharfinger, without any thing done thereon, was effective to complete the transfer of property. It is not necessary in this case to decide, whether an indorsement of the dock warrant will pass the property, and though I should feel no doubt in deciding the general question, yet I hold it more prudent in this case to abstain. This is also distinguishable from every other case, except the case of *Spear v. Travers*, and *Harman v. Anderson*, decided by Lord *Ellenborough* and the Court of *King's Bench*. There are two parts in the last mentioned case, and though Lord *Ellenborough*, Ch. J. did say at the trial that the transfer in the books passed the property, yet he afterwards says, "The delivery note was sufficient, without any actual transfer being made in their books. *Spear v. Travers* is valuable for two purposes: first, it shews what *Gibbs*, Ch. J. held, respecting the operation of these dock warrants; secondly, it shews that a special jury have expressed

an opinion upon the subject. The sugars must be deposited with the Dock Company for securing the duties. The warrant itself contains a form of indorsement. What can be stronger to shew the intention of the parties, that the property should pass by indorsement, than the form of indorsement put on it in the original making of the instrument? In *Lempriere v. Pasley*, *Ashhurst, J.* lays down, that the assignees must be affected with the same equities as the bankrupt; and as a banker would have a lien against the bankrupt, so has he against the assignees. But it is said, the property itself must be actually delivered, and cannot pass by delivery of the securities. The general rule is this: if the bankrupt indorses the bill of lading of a ship at sea, the property passes. The reason is given in *Lempriere v. Pasley*, viz. that the beneficial interest is in the creditor, though the legal estate is in the bankrupt. How can it be said, that where the property, by its nature, is to pass from hand to hand by the assignment of the document which is the title-deed of the property, there it shall not pass by indorsement of these dock warrants. Here, too, is proved a notice, and actual assent by the clerk of the Dock Company, saying, "all was right." The second point is decided by the first. It does not appear to be possible that it can be seriously contended that these goods were in the order or disposition of the bankrupt. The principle of that statute of *Jao. 1.* is, that mere possession of goods is the first proof of property, and the holder gets credit accordingly; and he who trusts a bankrupt with the possession will abide the event accordingly. But here the bankrupt had neither the actual nor the legal possession. But suppose he had a legal possession, was the property that of which he was the reputed owner? If, after borrowing the first 10,000*l.*, he had gone to another banker, to borrow more, he could not have done it, without indorsing the dock warrant to the



lender, and that he had not to produce. I have been several times stopped by a special jury, they being satisfied that the goods pass from hand to hand by indorsement of these instruments. All special juries cry out with one voice, that the practice is, that the produce lodged in the docks is transferred by indorsing over the certificates and dock warrants, and therefore there is no reputed owner, if he does not produce his certificate. The case of the dyer's plant, *Bryson v. Wylie*, is not applicable. Nor is that of *Taylor v. The East India Company*. The case is expressly the reverse; for no transfer could be made in the books of the *East India Company*: it was a breach of their regulations for *Cameron* to part with that privilege at all; therefore taking this either on the justice of the case, or on the law of the case, the plaintiffs are entitled to recover.—*Park, J.* Notwithstanding the present state of the court, and the importance of this question, and the quantity of property depending on it, it would be improper for me to entertain a doubt, in a case where there is no ground for doubt at all. It was argued by the counsel for the plaintiff, that the apparent ownership remained with the bankrupt, but I know not what more the bankrupt could do to divest himself of the possession, than he did. For the bankrupt gives an order to the Dock Company for delivery of the whole, and the defendants did get possession of two parcels of these goods, which actually were delivered. Therefore the bankrupt had done all that depended on him. I give great weight to the inconvenience which the defendant's counsel relies on, that it would be dreadful, if a merchant had to go down to the dock ten or twenty times in a day to see to transfers of these goods. No man living would have purchased these goods, unless the dock warrants had been produced: they were the key of this property. All the cases are distinguishable: in every one of them there was a possession, which there is

not here. Was there a delivery here? If not, wherefore did the assignees bring their action of trover? In most cases the assignees have been the holders of the property, and the party who contends that the transfer has not been completed, has sued to recover it back; here the action is brought to enforce the completion. Without infringing on the stat. 21. Jac. 1. in the least respect, and supporting all the cases that have been cited to-day, we must hold that this property passed to the defendants. There is no lien on the lease, which was casually left in the defendant's possession.—*Burrough, J.* There is not a question as to the lease. The case states that the bankrupt applied to borrow money on it, which the defendants declined to lend: a court of equity, therefore, never would have deemed this a security for money. It was left in the defendant's banking-house by mistake, and the defendant's possession of it is explained. As to the other part of the case, I have no doubt but that the property is in the defendants. This instrument is perfectly well known to all traders, and it is also known to them that the goods pass by indorsement of it, and there is no reason why they should not: it is a transfer of a mere chattel, and there is no reason why an order for delivery of the goods should not pass the property. I should have thought, independently of the notice to the Dock Company, that the property was transferred by the mere indorsement for a valuable consideration. One circumstance is important, as clothing the party with the actual possession of the goods, that the warehouse-keeper declared the orders sufficient for the delivery of the goods, and delivered a part of them. This is a question between two original parties, and not between an indorsee and another. As to the statute of *James*, the goods must be by the consent and permission of the true owner, in the order and disposition of the bankrupt. It is impossible to believe, that on the 8th, these goods were in the possession

of the bankrupt, with the consent and permission of the defendants. The moment that notice was given to the Dock Company, they were converted into trustees for the defendants, if it be necessary so to contend; but it is not necessary to go so far, for the statute points to an actual possession. In *Horne v. Baker*, there was the actual possession, and the goods were used in his trade of a distiller. *Bryson v. Wylie* was decided upon the ground that it was a fraudulent trick. Had the bankrupt here the power of alteration or disposition of these goods? How could he transfer them? No man in the city of London would have bought these goods without seeing the dock-warrant. It was not, in the nature of things, possible that the bankrupt should sell or dispose of them. In the case of *Gordon v. The East India Company*, no alteration could be made in the books of that company, and *Cameron* was acting in disobedience to their orders, which he was bound to obey: therefore his act was a fraud on the company, and the case mainly turned upon that circumstance. I know not whether these instruments were in use at the time when the case of *Gordon v. The East India Company* was decided: but Lord *Kenyon*, Ch. J. relies there, on the absence of a document which *Taylor* could have carried to market for the purpose of disposing of that property. Here is that document. What *Mansfield*, Ch. J. says in *Thackthwaite v. Cock*, is material to the present case. He says, "there is not such a clear, distinct, and precise custom proved as would enable others to see that these may not be the hops of the possessor." Here subsists, I will not call it a custom, but so clear an understanding of the trade, that this instrument by indorsement would pass the property, that every one may see that they are no longer the property of the bankrupt, who has ceased to possess this document. The defendants are therefore

entitled to our judgment on this part of the case, though not on the other.—Judgment for the plaintiff for 1218*l*.

**SMITH v. PLUMMER, 1818, 1. BARN. & ALDERSON, 575.**—Assumpsit by the plaintiffs, as assignees of *John Kirkpatrick*, a bankrupt, to recover from the defendants the sum of 620*l*. 13*s*. 7*d*. for freight and pierage for goods from *St. Christopher's* to *London*. The defendants pleaded the general issue, with a notice of set-off for money lent and advanced to, and paid, laid out, and expended for the plaintiffs. The cause came on to be tried before Lord *Ellenborough* at *Guildhall*, at the first sittings in *Easter* term, 1817, when a verdict was found for the plaintiffs for 620*l*. 13*s*. 7*d*., subject to the following case:—The plaintiffs are the assignees of *John Kirkpatrick*, a bankrupt, under a commission of bankruptcy dated the 25th of *June*, 1811. The act of bankruptcy was committed on the 20th *June*, 1811, the usual notice inserted in the *Gazette* on 6th *July*, 1811, and the assignment to the plaintiffs duly executed on the 6th of *August*, 1811. The said *John Kirkpatrick* before his bankruptcy was sole owner of the brig *Albion*, *Adam Little* master, which arrived in *St. Christopher's* in the month of *June*, 1811, and there received on board a cargo of sugar and rum by the means and agency of *William Thompson* of that island, part of which cargo consisted of 30 hogsheads and one tierce of sugar, and 104 puncheons of rum, was consigned to the said defendants in *London* by the said *William Thompson*, by bills of lading, dated one on the 24th and the other on the 26th *June*, 1811, in the customary form, the freight and pierage of which, at the rate therein specified, amounted to 620*l*. 13*s*. 7*d*. The *Albion* sailed from *St. Christopher's* 26th *June*, 1811, and arrived in *London* on or about the 26th day of *August*, 1811, with the said goods

on board, and was reported on that day at the custom-house by the plaintiff's agents, and the goods warehoused at the *West India Docks*. The master when at *St. Christopher's* drew several bills of exchange for his disbursements on account of the said brig, and the premiums paid to *Thompson* for procuring his cargo, upon the said *John Kirkpatrick* as owner thereof, payable to the said *William Thompson*, or order, and amounting altogether to the sum of 526*l.* 14*s.* 8*d.*; and which bills of exchange were duly presented for acceptance and payment, and were refused acceptance and payment by the said *John Kirkpatrick*, and have been since returned to the said *William Thompson* as indorser thereof, under protest, and have been paid by him, and of which due notice was given to *Little*. On the brig's arrival in *London*, the master, in consequence of the refusal of the plaintiffs to pay his wages, which, at the time of the bankruptcy of *Kirkpatrick*, amounted to 260*l.*, and still amounts to that sum, or accept the bills drawn by him, or indemnify him against the same, refused to deliver up the bills of lading to the plaintiffs, and directed the *West India Dock Company* to detain the cargo, which was accordingly done, until the 29th *October* and 9th of *November*, 1811, when the goods consigned to the defendants were delivered to the defendants, in consequence of the master taking off the step on the goods at the said docks. Upon the arrival of the ship in the river *Thames*, viz. on the 29th *August*, 1811, the master applied to the defendants as the consignees of the said goods, for an advance to enable him to defray the current expenses of the said vessel, and the defendants did accordingly on that day advance to him the sum of 150*l.* for that purpose. On the 3d of *September*, the plaintiffs gave notice by their agents to the defendants, not to pay the freight due on the consignment to them, to *Little* the master; to which the defendants answered, that they were

authorised by *Little* to receive the freight from the consignees, being principally due from themselves, and that, when received, they should hold it agreeable to his instructions, and pay it over to any one empowered by him to receive it, after deducting the 150*l.* advanced by them. On the 29th *October*, the plaintiffs by their agents gave a further notice to the defendants, that they, as assignees of *Kirkpatrick*, should hold them responsible for any money they had paid or should pay to *Little* on account of the freight, and on the 5th *November*, a more formal notice to the same effect signed by the plaintiffs themselves, was served upon the defendants. At the time of these transactions the plaintiffs and the bankrupt resided at *Liverpool*. *Little* is since dead, and neither he nor his personal representatives have taken up the bills. The defendants claim to retain 150*l.*, part of the amount of the freight, &c. to satisfy the advance made by them to *Little*, the master, and the residue on the ground that the master had a lien thereon for his wages, and the amount of the said bills of exchange so drawn by him, and that he authorised them not to pay over such residue to the said plaintiffs.—The question for the opinion of the court is, whether the plaintiffs are entitled to recover the whole or any part of the said sum of 620*l.* 13*s.* 7*d.* If they are entitled to recover the whole, then a verdict is to be entered for that sum; if the defendants are entitled to deduct a set-off the sum of 150*l.* advance by them, then a verdict is to be entered for the plaintiffs for 470*l.* 13*s.* 7*d.*; and if the plaintiffs are not entitled to recover any part, then a nonsuit to be entered.—Lord *Ellenborough*, Ch. J. The owner has undoubtedly the primary right to receive the freight, and to sue the consignees of the goods for it: and whether the master has any right to receive the freight from them as against his owners, will depend upon the question whether he has any lien upon the freight. In the first place, he has

no lien on the ship for his wages; then as to the advances made abroad, they may indeed constitute a debt due to him from the owners, but he has no lien for them. The case of *Wilkins and Others v. Carmichael* decided that a captain of a ship has no lien on the ship for wages, stores, or repairs done in *England*; and *Hussey v. Christie and Others* decides that he has none for money expended or debts incurred by him for repairs on the voyage. Then if he has no lien on the ship, as appears from these cases, he can have none upon the freight, as the lien on the freight is consequential to the lien upon the ship: and here there is the additional circumstance, that it is not proved that these advances abroad were made for the current expenses of the ship. There is therefore in this case no pretence for the lien on the part of the master, through whom the defendant sets up this claim. The plaintiff therefore is entitled to recover.—*Bayley, J.* I am of the same opinion. The master is the servant of the owners, and it is in his power, in order to protect himself against any loss from non-payment of wages, or for advances, &c. made by him abroad, to make a specific bargain with them, and require security for its performance. Liens only exist three ways; either by express contract, by usage of trade, or where there is some legal relation between the parties. In this case there is no express contract, nor any usage of trade, and the term legal relation applies only to those persons on whom the law throws an obligation to do particular acts, and in return for which, to secure payment, it gives them a lien; as, for instance, an innkeeper, carrier, and tailor. It has been decided that the master has no lien on the ship, either for repairs, wages, or advances. If, therefore, he has none on the ship, he can have none on the cargo; for they must stand on the same footing; and if any hardship arise to the master from this, it is owing to his having made an imperfect bargain with his

owners. Then, as to the 150*l.*, it is said that it is at all events paid to the master in his character of master, and by the consignee, and as part of the freight. It is paid to him in that character, and by the consignee; but it is not paid to him as part of the freight. For these reasons, it seems to me that the plaintiff is entitled to recover for the whole sum.—*Abbott, J.* I am also of opinion, on both grounds, that the plaintiff is entitled to recover. It has been already decided that the master has no lien on the ship for wages or other disbursements, and he has no right to sue for these against the ship in the Admiralty. These decisions seem to lead to the conclusion that he has no lien on the freight; for the right to receive the earnings of the ship must follow the right to the ship itself. As to the second point, it is said that the advance of the 150*l.* to the master was made to enable him to defray the current expenses of the vessel; but it is not stated that these current expenses were actually paid by him, and, for any thing that appears, the owners might have furnished him with money for that purpose. It is not necessary to say what the law would be if the money had been advanced abroad, and had been actually applied to the expenses of the ship: for this takes place after the arrival of the ship in the river *Thames*; and it is quite sufficient for the decision of the present case to say, that an advance of money to enable the master to defray the current expenses in *England*, cannot be considered as a part payment of freight to the owners by the consignees.—*Holroyd, J.* I am of the same opinion, that the master has no lien on the cargo, on the freight, or on the ship. The cases which have been cited expressly decide that he has no lien on the body of the ship in respect of wages, or money expended for stores or repairs, and the lien on the freight must stand upon the same ground. Then, as to the 150*l.*, I think that cannot be considered as a part payment of the freight, but as a



loan to the master by the consignees.—Judgment for the plaintiff.

LEVY v. BARNARD, 1818, 2. MOORE, 34.—The plaintiff being resident abroad, ordered *B. and Co.* in *London*, to effect an insurance on his account, who not being in the habit of effecting their own insurances or those of their correspondents, delivered an order to the defendant, being their broker, who accordingly effected it in their names, when he handed over the policy, and debited them with the premiums. The plaintiff paid the amount of those premiums to *B. and Co.*, without the defendant's knowledge; a loss being subsequently claimed by the plaintiff, the policy was re-delivered by *B. and Co.* to the defendant, for the purpose of his procuring an adjustment; there was an open account between the defendant and *B. and Co.*, and in 1813, they were indebted to him in 21,000*l.* in such open account, including the premiums in question, and, in 1814, they paid him 33,000*l.* on account of losses and returns on insurances effected for them; and in the latter part of that year, the defendant was a considerable creditor on such account.—Held, that under these circumstances, the defendant had not a lien on the policy, either for premiums or his general balance. Although a broker may have parted with the possession of a policy, still if he become repossessed thereof, he has a lien on it for premiums which may be unpaid,

TATE and others v. MEEK, 1818, 2. MOORE, 278.—*A.* as owner of a ship, covenanted with *B.* the freighter, for a voyage from *London* to *Bahia*, there to receive a full cargo, and proceed to the first port in the *English Channel*, where, on her arrival, notice should be given to the freighter, from whom orders should be received at what port the cargo should be delivered, according to bills of

lading. *B.* covenanted to put a full cargo on board, and to pay freight at certain rates per ton, viz. 300*l.* in cash on the day the vessel should be reported inward at the Custom-house, and the remainder by good bills payable in *London*, at two months after date, from the day on which the delivery should be completed. *A.* bound the vessel and freight, and *B.* the merchandize to be taken on board her, for due performance. The vessel shipped a cargo for the freighter at *Bahia*, together with other merchandize, consigned to other persons in *London*. By the bill of lading the freighter's goods were to be delivered, on his paying freight for the same, as per charter-party. The vessel having arrived at *London*, the owner delivered the goods to the different consignees, on their paying freight reserved by bills of lading, at a less rate than that stipulated by the charter-party. The owner refused to deliver the freighter's cargo without payment of the freight due under the charter-party.—Held, that he was entitled to detain it for the hire of the vessel, as the delivery of the goods and the payment of freight were concomitant acts, and that if the master unship the whole of the cargo, the delivery would be complete, and that the freighter should then pay for and deliver bills for the amount of the freight, as stipulated by the charter-party.

**YATES v. RAILSTON, 1818, 2. MOORE, 294.**—If the owner of a ship covenant by charter-party to let her to freight, and deliver the cargo in good order and condition, and the freighters covenant to pay freight on safe delivery of the cargo, one-third in cash, and the remaining two-thirds by approved bills of exchange at four months' date.—Held, that the delivery of the cargo and payment of freight were concomitant acts, and that the owner had a lien on the cargo till he was satisfied for the amount of freight remaining due.

**YATES v. MENNELL**, 1818, 2. MOORE, 297.—Where the owner covenanted to deliver the cargo agreeably to bills of lading, and the freighters covenanted to pay one-third in cash on arrival, and the remainder on delivery of the cargo by good bills of exchange at four months date; if the captain land the goods in his own name, and offer them to the freighter at one delivery, on receiving the stipulated freight.—Held that the owner has a lien on them until such bills of exchange are produced by the freighter.

**HOULDITCH v. DESANGES**, 1818, 2. STARKIE, 337.—*A.* sells to *B.* a carriage, to be paid for partly by a bill upon the delivery, and partly by a bill at a future day, and *B.* neglecting to take the carriage, *A.* obtains a verdict against him for goods bargained and sold. Until the amount is paid to *A.* he has a lien upon the carriage, and the sheriff cannot seize it under a *feri facias* against the goods of *B.*

**THOMPSON v. LACY**, 1820, 3. BARN. and ALDERSON, 283.—A house of public entertainment in *London*, where beds, provisions, &c. are furnished for all persons paying for the same, but which was merely called a tavern and coffee-house, and was not frequented by stage coaches and waggons from the country, and which had no stables belonging to it, is to be considered an inn, and the owner is subject to the liabilities of innkeepers, and has a lien on the goods of his guest, for the payment of his bill, and that even where the guest did not appear to have been a traveller, but one who had previously resided in furnished lodgings in *London*.

**HORNCastle v. FARREN**, 1820, 3. BARN. and ALDERSON, 497.—Where the owner of a ship having a lien on the goods until the delivery of good and approved

bills for the freight, took a bill of exchange in payment, and though he objected to it at the time, afterwards negotiated it.—Held, that such negotiation amounted to an approval of the bill by him, and that it was a relinquishment of his lien on the goods.

CRAWSHAY v. HOMFRAY, 1820, 4. BAEN. and ALDERSON, 50.—The wharfage, &c. due upon goods imported was, by the course of trade, paid by the importer at the *Christmas* following the importation, whether the goods were in the mean time removed or not. The goods were sold to *A.*, and, after *Christmas*, the merchant importer became bankrupt.—Held, that there was no lien on the goods for the wharfage, &c. as against *A.*

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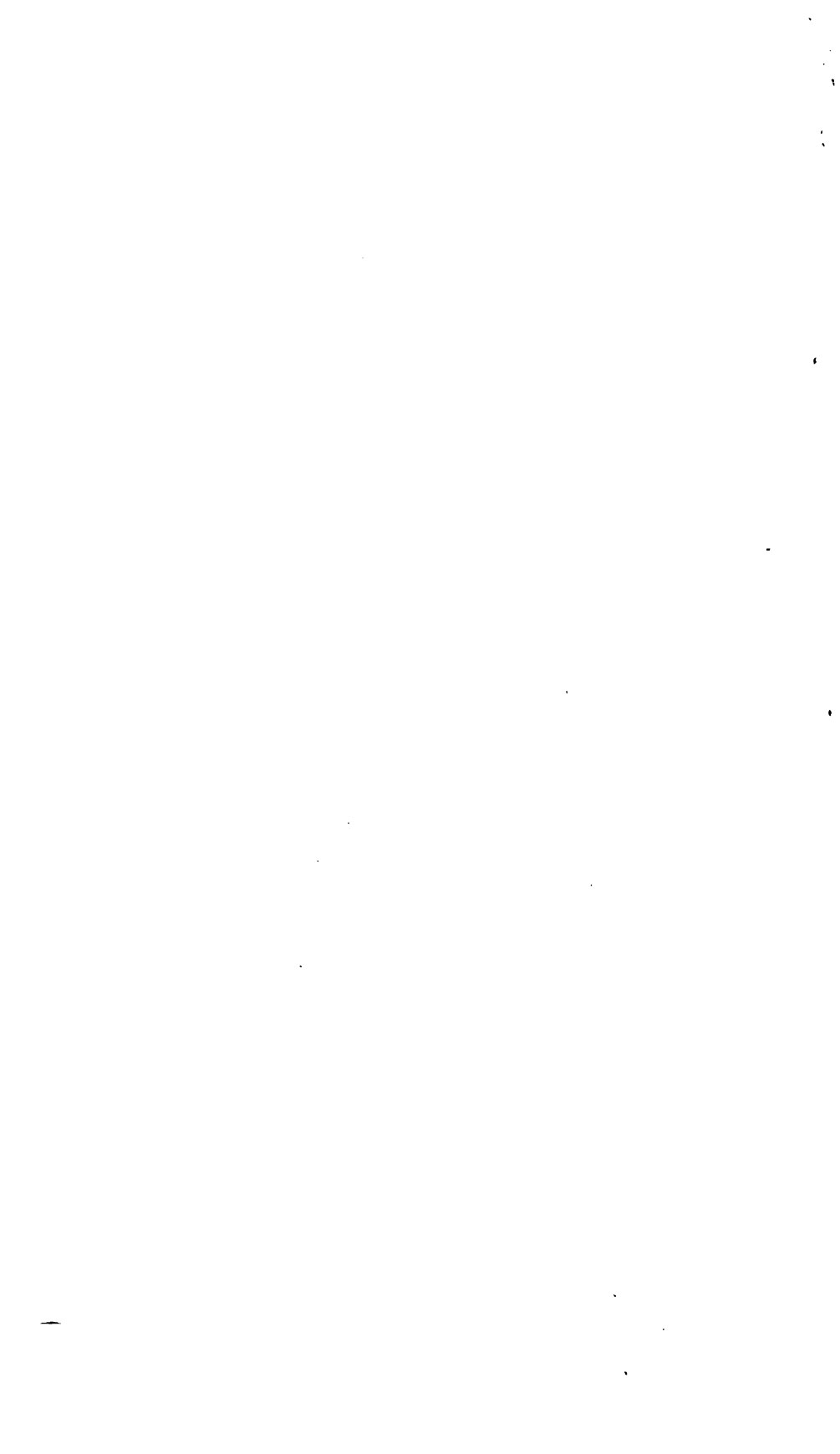
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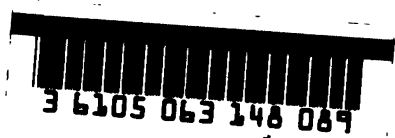
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